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ORIGINAL

In the matter of:

Digital Performance Right in  
Sound Recording and Ephemeral  
Recording

Docket No.  
2000-9

CARP DTRA  
1 & 2

CARP Hearing Room  
LM-414  
Library of Congress  
Madison Building  
101 Independence Ave, SE  
Washington, D.C.

Wednesday  
August 8, 2001

The above-entitled matter came on for hearing,  
pursuant to notice, at 9:00 a.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON      Chairman  
THE HONORABLE JEFFREY S. GULIN      Arbitrator  
THE HONORABLE CURTIS E. von KANN      Arbitrator

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## C-O-N-T-E-N-T-S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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**LaVerne Evans**

By Mr. Sigall	2107			
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**W. Kevin Dorsey**

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**Greg Hessinger**

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**Lawrence Kenswil**

By Ms. Woods	2398			
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<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>RECD</u>
SX 19	AFTRA position paper	2379	2387
SX 18	House testimony	2390	2394

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:03 a.m.)

3 CHAIRMAN VAN LOON: Well, good morning,  
4 everyone.

5 Let me ask first whether there are any  
6 administrative or procedural matters to come before  
7 the panel?

8 MR. STEINTHAL: I'd just like to give to  
9 the panel -- and I've already given to the court  
10 reporter and the other side -- a complete version of  
11 Exhibit 12 with the missing page.

12 CHAIRMAN VAN LOON: Oh, great. Thank you  
13 very much.

14 And this one, if I recall, we did admit.

15 MR. STEINTHAL: It's admitted.

16 CHAIRMAN VAN LOON: But it's just a  
17 correction. Okay.

18 And while we're looking at old things, the  
19 elusive 007, are we still continuing on getting a  
20 cleaned-up version of that?

21 MR. GARRETT: We have not yet conferred  
22 with the other side on that.

1 CHAIRMAN VAN LOON: Okay.

2 MR. NEWBERG: I also have -- you wanted a  
3 list of the partly open motions between Hunter  
4 Douglas.

5 CHAIRMAN VAN LOON: Oh, yes. Thank you  
6 very much.

7 MR. NEWBERG: Sure.

8 ARBITRATOR GULIN: There was also an 009  
9 that I don't have a copy of. I believe it was an  
10 Exhibit 9 submitted.

11 MR. STEINTHAL: We'll get you a copy of  
12 that.

13 ARBITRATOR GULIN: In fact, I don't think  
14 the court reporter has a copy either. You might want  
15 to get him a copy.

16 MR. STEINTHAL: I have no reason to doubt  
17 the accuracy of the list that was given to you; that  
18 we're going to look at it and see if there's anything  
19 that might be additional.

20 CHAIRMAN VAN LOON: And do we have an  
21 update on time, where we stand, the minutes report?

22 MR. NEWBERG: I think we were going to

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1 concur at the first break and get a full report.

2 CHAIRMAN VAN LOON: Fine.

3 We have consulted further with the general  
4 counsel's office this morning. They had an inquiry  
5 for -- there's going to be a colloquy at the close of  
6 business today about outstanding motions. He wanted  
7 you to understand that he had questions and wanted a  
8 discussion, but does not plan to make any ruling or  
9 final determinations today. And had the question of  
10 whether you would like to have the court reporter  
11 present to have that on the record, or whether, since  
12 it's a discussion without rulings, you would forego  
13 that.

14 MR. STEINTHAL: I'd prefer to have the  
15 court reporter here I think.

16 MR. GARRETT: I don't need the court  
17 reporter here.

18 CHAIRMAN VAN LOON: I see. Well, maybe  
19 you can discuss and see if there's any consensus; give  
20 further thought about it.

21 They have also expressed the strong hope,  
22 which the panel shares, that this would not be a 7:00



1 meaning; that we'd be able to do it at 6:00 tonight or  
2 God forbid it should be earlier. But that would not  
3 cause dismay in the general counsel's office if it was  
4 even before 6:00.

5 MR. GARRETT: Mr. Chairman, did  
6 Mr. Roberts indicate which particular motions he'd  
7 like to discuss with us?

8 CHAIRMAN VAN LOON: He did not, certainly  
9 not today.

10 ARBITRATOR GULIN: All I heard him say was  
11 discovery motions.

12 CHAIRMAN VAN LOON: Yes.

13 MR. GARRETT: Thank you.

14 CHAIRMAN VAN LOON: Well, then, Ms. Evans,  
15 let me welcome you. And I thank you for your  
16 patience. I know that you've been waiting for a while  
17 to go on the stand and I gather a new arrival at the  
18 same time.

19 Let me ask the court reporter to swear you  
20 in.

21 Whereupon,

22 LaVERNE EVANS

1 was called as a witness, and, having first been duly  
2 sworn, was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. SIGALL:

5 Q For the record, Ms. Evans, can you state  
6 your name?

7 A LaVerne Evans.

8 Q And what is your current position?

9 A I'm the senior vice president and general  
10 counsel for BMG Entertainment.

11 Q And can you briefly state your educational  
12 background?

13 A I obtained my undergraduate degree from  
14 Harvard College and my juris doctor degree from  
15 Harvard Law School.

16 Q Can you briefly give the panel a sense of  
17 what BMG Entertainment does?

18 A BMG Entertainment is essentially the music  
19 arm of an international media company by the name of  
20 Bertlesman AG. We have about 200 record labels owned  
21 or affiliated throughout the world.

22 Q And for the panel's reference, you list

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1 some of the recording artists that are with BMG labels  
2 in your testimony?

3 A Yes, I do. Aretha Franklin, Whitney  
4 Houston, TLC, Dave Matthews Band.

5 ARBITRATOR VON KANN: Is it the company  
6 that Bill Klein recently joined?

7 THE WITNESS: It is indeed. He's actually  
8 the president of Bertlesman, Inc., which is the  
9 U.S. -- the major U.S. subsidiary. Our interests are  
10 held by --

11 ARBITRATOR VON KANN: All of your  
12 antitrust should disappear.

13 THE WITNESS: You know, I'd like to think  
14 that, but, unfortunately it doesn't seem to be going  
15 our way.

16 BY MR. SIGALL:

17 Q Can you describe your position with BMG  
18 and what you do?

19 A Essentially what I do is I'm involved with  
20 worldwide legal and business affairs. I oversee that,  
21 and I set policy for the company in that regard. I  
22 negotiate and approve contracts with third parties in

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1 various areas-- recording contracts, joint-venture  
2 contracts, and obviously contracts with new media  
3 enterprises.

4 Q And you're also a member of the RIAA  
5 Webcasting Negotiating Committee?

6 A I am. I and members of my staff have  
7 participated in that committee.

8 Q And what is the purpose of your testimony  
9 here today?

10 A The purpose of my testimony is to talk  
11 about some of the factors that we considered in the  
12 RIAA Negotiating Committee when we were negotiating  
13 the webcasting licensing agreements and also to talk  
14 about some agreements that we've negotiated at BMG  
15 that we feel are relevant benchmarks to setting rates  
16 for the webcasting licenses under Section 114 and 112  
17 in the Copyright Act.

18 Q So you have reviewed the public version of  
19 the Ron Wilcox testimony?

20 A I have.

21 Q And if you could get that out for  
22 reference.

1 ARBITRATOR VON KANN: Did you know  
2 Mr. Wilcox when you were at Sony?

3 THE WITNESS: I did. I did indeed.

4 BY MR. SIGALL:

5 Q And I'm referring to page 3 and 4 of the  
6 public version of his testimony.

7 A Yes.

8 Q Can you describe for us BMG's perspective  
9 on the factors listed here and how they relate to the  
10 webcaster licenses that the RIAA has negotiated?

11 A I would say that all of these factors are  
12 factors that certainly I and members of my staff and  
13 the business people of BMG consider in negotiating  
14 licensing agreements both in a traditional media and  
15 in the new media.

16 I would turn with particular emphasis to  
17 recognizing the importance of licensing revenues. As  
18 I stated, part of my responsibility is strategic in  
19 nature in thinking about the kinds of deals that BMG's  
20 going to do. And we have to think about the types of  
21 licensing revenue that we have today, which are  
22 important ancillary income streams for us that also

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1 try to project forward to 5, 10 years out to  
2 understand what our revenue streams are going to be at  
3 that point in time as well.

4 So since we make very significant  
5 investments into producing sound recordings, which  
6 hasn't diminished over time, it only increased, with  
7 the importance of hit product really driving our  
8 revenue stream, I would say Factors 3 are important in  
9 that regard, extremely important; Factor 2, because  
10 the costs and the risks that we incur are significant,  
11 and we want to produce high-quality music, and it's a  
12 very competitive marketplace in that regard.

13 I would also probably draw your attention  
14 to Factor 1, the value that our sound recordings bring  
15 to others who use them to build or establish a  
16 foundation for their businesses. I think we do take  
17 that into consideration when we're trying to determine  
18 what are relevant licensing terms for our sound  
19 recordings. Those relationships are very important to  
20 us. We try to sit down and have a dialogue with  
21 potential licensees to see how we can get value and  
22 how they can get value, and if part of the value

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1 that's being conceived there or received there is that  
2 our sound recordings form a foundation for their  
3 business, that's taken into serious consideration.

4 I would also that, looking at -- in the  
5 new media environment, the opportunity to interface  
6 with consumers in a slightly more and potentially very  
7 much more direct way is something that has captured  
8 our attention and that we've been thinking about quite  
9 seriously for the last several years. And the extent  
10 to which services provide alternative means of  
11 satisfying consumer interests have to be considered by  
12 us as well. It's sort of a portfolio of interests, if  
13 you will, and we have to balance that portfolio and  
14 balance the revenue streams generated in that  
15 portfolio.

16 I would also say that we do not -- we do  
17 not in any way discount the fact that certain outlets  
18 for music are promotional in nature. Certainly  
19 hearing music is one of the ways that people learn  
20 about music and they want to buy music. So we do  
21 consider the extent of the promotional value obtained  
22 in each licensing transaction or opportunity.

1           We've spent a lot of time actually having  
2 focused on -- and we're in the business of promoting,  
3 marketing and selling records; that's what we do, or  
4 sound recordings at this juncture, not just records.  
5 And one of the things that we consider is what's the  
6 promotional value versus what the risk is; that that  
7 particular delivery might actually get a risk of  
8 substitution of our primary revenue stream, which at  
9 this point, unfortunately, is just the sale of  
10 records.

11           And finally, something that I feel that  
12 we've devoted a fair amount of time to, albeit  
13 certainly from time to time with varying degrees of  
14 success, is trying to get our arms around the security  
15 issues associated with digital delivery and  
16 participation in SDMI. We've been very actively  
17 participating in that across the company and trying to  
18 understand how to prevent leakage and protect our  
19 investment. These are our assets.

20           MR. SIGALL: Thank you.

21           At this point we will be discussing the  
22 confidential business information of BMG and that has



1           been marked as restricted in this proceeding. And I  
2           would request that hearing room be cleared and the  
3           session be closed.

4                       CHAIRMAN VAN LOON: We need to, then, go  
5           into private session.

6                       Do you anticipate that this will be a long  
7           time?

8                       MR. SIGALL: I don't think so. I think  
9           it's probably 15 minutes or 20 minutes or so.

10                      CHAIRMAN VAN LOON: And then, presumably,  
11           some of the cross, at least, will also be restricted.  
12           Okay.

13                      So we're in closed session now.

14                      (Whereupon, the open session was  
15           discontinued, and the closed session  
16           commenced at 9:16 a.m.)

17

18

19

20

21

22

1                   CHAIRMAN VAN LOON: Mr. Harding, could I  
2 ask you to arrange, make sure that we're in open  
3 session for this?

4                   So if we're all settled, and let the  
5 record reflect that we're back in public session.

6                   I'd like to welcome you to the CARP  
7 hearing, and ask the court reporter to please swear  
8 you.

9 Whereupon,

10                   W. KEVIN DORSEY  
11 was called as a witness by Counsel for American  
12 Federation of Television and Radio Artists and having  
13 been first duly sworn, assumed the witness stand and  
14 was examined and testified as follows:

15                   DIRECT EXAMINATION

16                   BY MR. LEVINE:

17                   Q       Since much has passed since last I  
18 appeared, I'll reintroduce myself. I'm arthur Levine  
19 representing AFTRA. With me is Ann Trativitz, the  
20 National Director of Sound Recording of AFTRA.

21                               Would you please state your name?

22                   A       My name is Kevin Dorsey.

1 Q Mr. Dorsey, where do you reside?

2 A I reside in Los Angeles, California.

3 Q And what is your employment?

4 A I am a professional background vocalist  
5 and arranger.

6 Q And how long have you been in that  
7 profession?

8 A I'm starting my 18th year.

9 Q How do you -- in what media do you  
10 perform?

11 A Television, radio, film, phonograph  
12 recordings as well as touring live in shows.

13 Q What television shows have you performed  
14 on?

15 A The Grammys, the Emmys, the Oscars,  
16 Letterman, Tonight Show, Sole Train, MTV, VH1.

17 Q And what feature films have you appeared  
18 in?

19 A As far as working, "The Color Purple,"  
20 "Forest Gump," "Out of Africa," Apollo 13," Ferris  
21 Bueller," The Grinch," Lion King," Little Mermaid."

22 Q Are there any great movies that you

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1 haven't appeared in?

2 A Ah.

3 Q You've performed as a background vocalist  
4 on sound recordings, is that correct?

5 A Yes.

6 Q Who have you performed with?

7 A Barbra Streisand, Sinatra, Quincy Jones,  
8 Michael Jackson, Whitney Houston, Celine Dion, Dolly  
9 Parton, Kenny Rogers, Motley Crew, Sanborne, Jurrea,  
10 it can go on.

11 Q And have you toured with most of those  
12 people?

13 A Yes, I have, and continue to do so.

14 Q Could you explain to the panel the  
15 creative contribution that background artists perform  
16 on a sound recording?

17 A For the most part, a lot of people make  
18 the mistake in thinking as we go into a studio to  
19 perform a recording with a royalty artist, that all we  
20 do is go in there and just sing. I mean, a lot of  
21 times you'll go into a session and a producer and/or  
22 artist really -- they have a picture of what they'd

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1 like, but they really can't put it together. So we're  
2 called upon to arrange background vocals, produce  
3 background vocals. Sometimes at the end of a session,  
4 stay and help do a mix or premix to make sure that the  
5 vocal balance is correct.

6 So, we play a very intricate part. And  
7 most royalty artists are not -- they'll wait on a  
8 recording unless they can have the proper background  
9 vocalist to be there and be a part of that picture.

10 Q Typically how long would it take -- how  
11 much time would be -- of your time would be involved  
12 in -- as a background vocalist in creating a sound  
13 recording?

14 A There's a gambit there from a minimal  
15 amount of time to a Michael Jackson, who it might take  
16 three years to do a record and cut 140 some odd tracks  
17 at \$150,000/60,000 a track to keep 14.

18 You know, so I mean some days you can go  
19 into a studio and be in there 16 hours. Some days you  
20 can go in there and be 5 hours. Some days you can be  
21 a part of a project, like Michael's or someone else  
22 who takes their time, and be on -- not a payroll, but

1 at least be employed through that project for a couple  
2 of years.

3 Q And how are background vocalists paid?

4 A We have a scale that we follow, which is  
5 an AFTRA. And it varies from solo/duo rates, which  
6 are like are 167 --

7 Q 167 per?

8 A Per -- we call it per hour and/or per side  
9 or per track. And the larger the group, naturally,  
10 the smaller the scale. I mean, myself I'm a double  
11 and triple scale vocalist. And if a song reaches past  
12 3 minutes and 30 seconds, your scale doubles.

13 So if you were making, let's say \$300, and  
14 your song is 3 minutes and 31 seconds. If you're  
15 triple scale, you'd multiple that again by three.

16 Q Do you sing slowly whenever possible?

17 MR. JACOBY: Could we ask that the witness  
18 raise his beautiful voice a little bit.

19 THE WITNESS: Oh, I'm sorry. La, la.

20 ARBITRATOR VON KANN: What is a double and  
21 triple? You said you're a double and triple track for  
22 scale?

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1 THE WITNESS: Well, what it is, is because  
2 of -- like I said, I'm going into my 18th year. And  
3 it's not necessarily because of my tenure as a  
4 vocalist, but as someone who is requested a lot and  
5 evidently okay in my craft. Rather than the \$167,  
6 which is a scale payment, they would pay me either  
7 double that or/and triple that.

8 ARBITRATOR VON KANN: Okay.

9 THE WITNESS: Per hour or per track that  
10 I sing. And for someone like a Michael, I sometimes  
11 do 15 tracks.

12 BY MR. LEVINE:

13 Q And if a record is successful, would that  
14 also raise your --

15 A What happens at the success of a record,  
16 we receive what is called a contingency fee, which  
17 starts out -- we receive the first one after the  
18 product has sold, I think, 157,000 units. And we  
19 receive another 50 percent of what we made during our  
20 initial session. And then they go up in increments.  
21 157,000, 250, 300,000 all the way up to gold, which is  
22 500,000 and then platinum, which is 1 million copies

1 sold.

2 Q Do many of these records ever reach these  
3 higher plateaus?

4 A On a percentage scale, no. I mean, we all  
5 know the top artists, you know, get great sales. But  
6 you have so many different genres of music and  
7 usually, I mean, we're happy if it does get to that  
8 157, you know, let alone the platinum, which is 1  
9 million.

10 Q And are we talking about -- you're talking  
11 about percentage of scale, not what the record makes,  
12 is that correct?

13 A Well, I was just saying -- I was saying  
14 the percentage of artists that might reach any of  
15 those plateaus so that we can make use of a  
16 contingency scale.

17 Q Oh. You're generally aware of the Digital  
18 Performance Right and Sound Recording Act and it  
19 provides for nonfeatures vocalists and musicians?

20 A Yes.

21 Q Why is this new revenue stream, do you  
22 believe, of importance to nonfeatured vocalists?



1           A       Well, I think if this is going to be  
2 something of the future, and I feel that the  
3 foundation that we set now, you know, is going to set  
4 precedents for what happens in the future.

5                    I mean, the days of analog are gone. And  
6 we have to deal with this now and make sure that  
7 everyone is compensated correctly and fairly, you  
8 know, for work that we've done.

9                    MR. LEVINE: I have no further questions.

10                                    CROSS EXAMINATION

11                                    BY MS. SCHAEFFER:

12                    Q       Mr. Dorsey, good afternoon.

13                    A       Hello.

14                    Q       My name is Fiona Schaeffer.

15                    A       Pleasure.

16                    Q       And I understand --

17                                    CHAIRMAN VAN LOON: You need to keep your  
18 voice up, too.

19                                    MS. SCHAEFFER: Sure.

20                                    CHAIRMAN VAN LOON: Could you start again?  
21 We couldn't hear, sorry.

22                                    BY MS. SCHAEFFER:

1           Q       My name is Fiona Schaeffer, and I'm here  
2 on behalf of the Broadcasters and Webcasters  
3 Streaming, whose services are involved in this  
4 proceeding.

5           I understand you're getting married  
6 shortly?

7           A       Yes, I am.

8           Q       So I don't plan to take too much of your  
9 time this afternoon. I realize that's a far more  
10 important preparation.

11          A       I appreciate that and so does she.

12          Q       Great. But I did just want to ask you a  
13 few --

14          CHAIRMAN VAN LOON: Is the wedding this  
15 afternoon?

16          THE WITNESS: Saturday.

17          CHAIRMAN VAN LOON: Saturday. Okay.

18          BY MS. SCHAEFFER:

19          Q       So I just wanted to ask you a few  
20 questions on your testimony and, you know, the  
21 important contribution that you testified as to  
22 regarding the background vocalists.

1                   Now, I understand that AFTRA represents  
2 some thousands of background vocalists, is that right?

3                   A       I would say thousands. I'm sure -- they  
4 represent, I think, pretty much 80,000 performers  
5 overall.

6                   Q       Uh-huh. And these many thousands of  
7 background vocalists, they don't all work full time to  
8 create sound recordings, do they?

9                   A       I cannot say that honestly, because there  
10 are background vocalists, at least in Los Angeles and  
11 I know New York and pretty much everywhere else.

12                               From film to commercials, which is  
13 television and radio, and then phono. I mean, we --  
14 you have some their total concentration is a  
15 phonograph recording. You have vocalists like myself  
16 who encompass all.

17                               So, I mean for some, and I wouldn't know  
18 the exact percentage, that is their bread and butter,  
19 yes.

20                   Q       Okay. But there are some who work in  
21 other jobs because they don't have enough work, for  
22 example, as background vocalists on sound recordings?

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1           A       I don't know that for a fact, but I'd have  
2 to say yes.

3           Q       Okay.    And my understanding is that  
4 background vocalists are typically hired by the  
5 recording session, is that correct?

6           A       When you say the "recording session?"

7           Q       So you would not be hired, for example, as  
8 a full time employee of a record label, but the label  
9 would call you up and say I need you for the recording  
10 session next month with Barbra Streisand?

11          A       No.    The calls never come from the label.  
12 The calls come from the producer or the royalty  
13 artist.

14          Q       Okay.    But nevertheless, those calls  
15 coming from the producer and the royalty artist would  
16 say to you "We need you for this session?"

17          A       Yes.

18          Q       Okay.    Now, I understand that you're the  
19 chair or have been the chair of AFTRA's Singer  
20 Showcase Committee, is that right?

21          A       I still am, yes, and I've also -- I was  
22 just the national chair of the Singer's Caucus as well

1 as I was a national board member, as well as local.

2 Q Okay. And just looking at the Singer  
3 Showcase Committee, firstly.

4 A Yes.

5 Q Can you just tell me something about what  
6 the aim of that committee is? It says the words  
7 Singer Showcase in the title.

8 A Yes.

9 Q What's that about?

10 MR. LEVINE: And I just raise the fact  
11 that this is not in any way part of his direct  
12 testimony.

13 CHAIRMAN VAN LOON: I was starting to look  
14 for that.

15 Ms. Schaeffer?

16 MS. SCHAEFFER: I think it will become  
17 obvious that my line of questioning is directly  
18 related to Mr. Dorsey's questions, essentially  
19 relating to exposing new artists and promotional  
20 value, which I believe he's implicated in his  
21 testimony. But I can withdraw --

22 MR. LEVINE: He hasn't discussed

1 promotional aspects either in his testimony.

2 MS. SCHAEFFER: Well, I believe Mr. Dorsey  
3 is testifying about what a reasonable rate would be  
4 for background vocalists, therefore what consideration  
5 would be called into play.

6 MR. LEVINE: I think his testimony is that  
7 he would ask this panel to set a reasonable rate, but  
8 he hasn't in anyway said what that rate should be.

9 CHAIRMAN VAN LOON: Well, it says on page  
10 2 is should reflect the very important contribution  
11 that background artists make --

12 MR. LEVINE: Right.

13 CHAIRMAN VAN LOON: -- to the ultimate  
14 success of the recording.

15 MR. LEVINE: Certainly.

16 CHAIRMAN VAN LOON: And this line of  
17 questioning goes to that somehow?

18 MS. SCHAEFFER: Well, I would say that it  
19 goes to the respected value of the contribution and  
20 the value of the services, which are part of this  
21 proceeding.

22 I'm not wedded to the particular question

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1 if it's a problem.

2 ARBITRATOR VON KANN: And this is sort of  
3 background information on this background vocalist?

4 MS. SCHAEFFER: Correct.

5 ARBITRATOR VON KANN: The background of  
6 the background.

7 CHAIRMAN VAN LOON: We're going to  
8 overrule that at this point and allow you to proceed,  
9 please.

10 BY MS. SCHAEFFER:

11 Q So perhaps if you could just tell me a  
12 little bit about the aim of the Singer's Showcase?

13 A The aim of the Singer's Showcase, AFTRA,  
14 their job is to enforce the codes. People are signed  
15 to the codes there. And AFTRA does not find work for  
16 its members. So what we've done is we have a Singer  
17 Showcase and we invite producers from jingle or  
18 commercial houses, producers from record labels, film  
19 houses to come out and hear the vocalists. You have  
20 to be a member in good standing. And they come out  
21 and from that every now and then someone gets to sing  
22 on a commercial or gets to a film, sometimes even

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1 possibly a record deal. So that's our main thing.

2 It's our way of trying to get, you know,  
3 trying to get them work, yes.

4 Q Thanks, Mr. Dorsey.

5 So, I guess it's fair to say from what  
6 you've said that one of the aims of the Singer  
7 Showcase Committee is to showcase new talent and,  
8 hopefully, get new work for them?

9 A Yes.

10 Q Okay. So you would agree that new avenues  
11 to showcase the talents of background vocalists such  
12 as yourself is likely to give artists new work  
13 opportunities?

14 A New -- could you repeat that, please?

15 Q So you would agree that if new avenues for  
16 artists to showcase their talents may provide them  
17 with opportunities for new work? Additional work such  
18 as the record deal that you just testified to that  
19 they sometimes get from your Showcase Committee  
20 activities?

21 A Well, for that I couldn't say yes, because  
22 just as many people who get work from the Showcase,



1 just as many do not, you know.

2 Q Okay. But at least some people do,  
3 correct?

4 A Yes, some people do.

5 Q Would you agree with me that to the extent  
6 that webcasting offers new ways for artists to reach  
7 audiences or perhaps promotes or exposes new artists  
8 that that may also lead to more work opportunities for  
9 background vocalists such as yourself?

10 A I'd have to think about, in all honesty.  
11 I mean, and get more in depth of what it does. And,  
12 I mean, because right now I know it deals a lot with  
13 the royalty artist, and background artists are a part  
14 of that. But I'd have to weigh that.

15 Q Isn't it the hope of many background  
16 artists that they may one day become featured artists  
17 through exposure?

18 A I can't speak for all of them. For ones  
19 that I'm privileged to work with, the majority of them  
20 don't want a record deal. They --

21 Q Okay.

22 A -- they enjoy doing what they do.

1 Q Yes. You've performed as a background  
2 vocalist on commercials, I understand?

3 A Yes, I have.

4 Q And that includes in the radio industry?

5 A Yes, it does.

6 Q And are you aware that audio commercials  
7 are being developed -- starting to be developed for  
8 webcasting?

9 A I'm aware of that now.

10 Q And would you agree that such commercials  
11 would in the future provide further employment  
12 opportunities for vocalists such as yourself?

13 A That I don't know. There's a possibility,  
14 but I couldn't, you know, sit here and say yes.

15 Q You may not be able to quantify it, but  
16 you can certainly agree that that's a possibility,  
17 right?

18 A I'll still say I don't know, if that's all  
19 right.

20 Q I wanted to talk a little bit more about  
21 your creative contribution to the process.

22 A Yes.

1 Q Of making a sound recording, and certainly  
2 you have a very, you know, impressive résumé, Mr.  
3 Dorsey. I understand that you've testified that  
4 studio performers like yourself help to paint the  
5 audio masterpiece?

6 A Yes.

7 Q And I don't want us to make the mistake  
8 that many people apparently make that all you do is  
9 go in there and sing the song, and that's it.

10 Would you -- is it your view that it's in  
11 fact the artists -- and here I'm talking both the  
12 featured and the nonfeatured artists -- who make the  
13 principle creative contribution to making a sound  
14 recording?

15 A It's each component in making a successful  
16 phonograph recording is important. And, naturally,  
17 the featured artist or the royalty artist, it's their  
18 bread and butter; that's who the label is banking on.  
19 And the royalty artist as well as the producers have  
20 put enough faith in the background and/or studio  
21 singers to help them, as I said in my statement, paint  
22 this picture, you know, that will help lead to the

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1 hopeful success of the product.

2 Q Okay. So just to clarify. The royalty  
3 artists as well as the background vocalists, as well  
4 as the producers make an important contribution to  
5 making sound recordings, an important creative  
6 contribution?

7 A Each entity is important, yes.

8 Q Okay. Now, as a background vocalist  
9 you're not usually required to invest your own money  
10 in the creation of sound recordings, are you?

11 A If it's my own.

12 Q Yes.

13 CHAIRMAN VAN LOON: I'm sorry, I didn't  
14 hear you.

15 THE WITNESS: I said if it's my own.

16 CHAIRMAN VAN LOON: If it's your own?

17 THE WITNESS: Yes. If it's my own  
18 recording.

19 BY MS. SCHAEFFER:

20 Q As a background vocalist --

21 A Yes, I mean I can be a background vocalist  
22 on my own recording, is what I'm saying. That's where

1 I would be investing the money.

2 Q Yes. So if you're a background vocalist  
3 on Barbra Streisand's sound recording, no one's going  
4 to come to you at the door and say "Hey, you got to  
5 pay up," before you come in and make the sound  
6 recording?

7 A No. No.

8 Q Okay.

9 ARBITRATOR VON KANN: What did you mean by  
10 "my own recording," that answer?

11 THE WITNESS: Well, not being funny, but  
12 just if in fact and I was working on a project for  
13 myself, so I would be putting in the capital to do the  
14 recording as well as singing on it, as well as paying  
15 other people.

16 ARBITRATOR VON KANN: Would that put you  
17 in the role of a producer for that purpose?

18 THE WITNESS: In a sense, yes.

19 ARBITRATOR VON KANN: Okay.

20 CHAIRMAN VAN LOON: And in that case might  
21 you be both a featured artist and the background on  
22 different tracks?

1 THE WITNESS: Yes.

2 BY MS. SCHAEFFER:

3 Q And would it be true to say that most  
4 background vocalists typically don't invest their own  
5 money in the creation of sound recordings on which  
6 they perform background vocals?

7 A Well, I mean, most background vocalist, I  
8 mean, if they're working on their own projects, they  
9 do.

10 Q Yes.

11 A You know, but I mean in the realm that  
12 you're talking about as far with a Streisand or with  
13 a royalty artist, no we're never asked to put up any  
14 capital.

15 Q Okay. And I'm correct that the use of  
16 sound recordings by the webcasters involved in this  
17 proceeding don't require any other capital outlay or  
18 investment on your part? The use of sound recordings  
19 by these webcasters doesn't require any capital outlay  
20 by you?

21 A No. None that I'm aware of.

22 Q I just wanted to ask a couple of questions

1 now about the remuneration you get for your  
2 contribution to sound recordings.

3 You've testified that background vocalists  
4 get paid a session fee for sound recordings?

5 A Yes.

6 Q And I'm correct that you get paid the  
7 session fee regardless of whether the sound recording  
8 is ultimately a hit?

9 A Yes.

10 Q And pursuant to the AFTRA sound recordings  
11 code you may get additional payment contingent upon  
12 whether the sound recording meets certain sales  
13 plateaus, correct?

14 A Yes.

15 Q And have you, in fact, earned such  
16 contingent fees yourself, Mr. Dorsey?

17 A Yes, I have.

18 Q And can you tell me how much those fees  
19 have amounted to?

20 A That I couldn't.

21 Q Yes.

22 A Over a span of 18 years. I mean, that I

1 couldn't give you a figure. And the contingency fee  
2 is 50 percent of the original session fee, as I  
3 stated. And I could name the artist, but once again,  
4 I couldn't name the amounts of what was received.

5 Q Okay. That's okay.

6 And finally, I understand the record  
7 companies also make contributions to your health and  
8 retirement fund, which is administered by AFTRA?

9 A Yes.

10 Q And that contribution, I understand, is  
11 based on a percentage of your gross fees that are paid  
12 by the record company?

13 A Yes.

14 Q I believe it's some 11 percent?

15 A Yes.

16 Q And that would include both the contingent  
17 fees and the session fees?

18 A It's the session fee.

19 Q Okay. And those rates for the session  
20 fees and the contingent fees that you've testified to,  
21 they've been set in negotiations between the record  
22 industry and your union, AFTRA, correct?



1 A Yes, they have.

2 Q And is it true that there's no maximum on  
3 the amount that -- there's no maximum limitation on  
4 the amount that you could get paid by law? They could  
5 negotiate up to whatever they could get?

6 A No maximum, just a minimum.

7 Q Yes. And if AFTRA members believed that  
8 the session fees that you get are too low or the  
9 contingent fees are too low, the AFTRA members can ask  
10 your union to negotiate for higher rate, correct?

11 A Each time the time period for the code is  
12 up, they can go on and say, you know, we'd like to --  
13 an increase in rates. You know, whether we get them  
14 or not is another story.

15 Q Right. And all the major record labels  
16 are required to pay the AFTRA scale fees in the code?

17 A All the labels that are signed to the  
18 code.

19 Q And that would include all the five major  
20 record labels?

21 A Yes.

22 Q Do featured artists every agree with

1 background artists to give the background artist a  
2 share of their royalties?

3 A It's never happened to me, but I can only  
4 speak for myself.

5 Q Okay. Now just finally, as a vocalist,  
6 obviously you work with musical compositions all the  
7 time, is that right?

8 A I'm sorry, could you repeat it?

9 Q As a vocalist, as a singer you work with  
10 musical compositions all the time?

11 A Yes.

12 Q Would it be fair to say that it would be  
13 impossible for you to do your job without the words  
14 and the music that composers create?

15 A Would it be impossible for me to do my  
16 job?

17 Q Could you sing without words and without  
18 music?

19 A Could I sing without words and/or music?

20 Q Right.

21 A Yes.

22 Q You got me there.

1           A       I'm a singer.

2           Q       Could you sing and perform the sound  
3 recordings which you are involved in in creating day-  
4 to-day without words and without music that are  
5 provided through compositions?

6           A       There'd be nothing to do. For the -- I  
7 mean, that's our purpose.

8           MS. SCHAEFFER:    I have no further  
9 questions, Your Honors.

10          CHAIRMAN VAN LOON: Thank you.

11                   And are there any further questions from  
12 any of your colleagues on this side of the room? Mr.  
13 Kirby, no one?

14          MR. JOSEPH:    Considering for a moment,  
15 Your Honor.

16          CHAIRMAN VAN LOON: Okay.

17          ARBITRATOR VON KANN: Let me ask Mr.  
18 Dorsey a question while they're considering.

19                   Is it reasonable to assume that the more  
20 records that are sold and made -- more records that  
21 somebody decides to make, the greater will be the  
22 opportunities for background vocalists like yourself?

1 If the number of records made next year doubles, I  
2 assume that there'll be lots more gigs to do?

3 THE WITNESS: Well, and that would be a  
4 wonderful thing, but the industry is changing so much.  
5 You have a lot of royalty artists that are going in,  
6 doing their own background work, you know, which is  
7 saving their budget. So, I mean, on the flip side of  
8 that it could mean more work and it could mean less.

9 ARBITRATOR VON KANN: Have you got any  
10 indication that as the -- one of the things we've been  
11 told here is that the radio stations tend to play a  
12 smaller segment of the total repertoire out there and  
13 that with Internet streaming there is now much more  
14 exposure for some of the, perhaps, lesser known  
15 artists than there was on straight radio. So that  
16 there's a greater opportunity for developing artists,  
17 new artists to have their records heard, perhaps on  
18 the Internet than has been true on the radio stations.

19 I don't know if you have a view about  
20 whether that's true or not. But assume for the moment  
21 that there's some truth to that, would you expect that  
22 that will expand the amount of work for background

1           vocalists over the long haul? Is the Internet likely  
2           to create more jobs for background singers, do you  
3           think?

4                   THE WITNESS: Right now I would say no.

5                   ARBITRATOR VON KANN: And why is that?

6                   THE WITNESS: And I say that, when you  
7           were mentioning that newer artists were allowed to --  
8           you know, they were getting exposure on the Internet  
9           and things of this nature. I mean, the majority of  
10          those performers are self-produced as well as self-  
11          financed. And the Internet has made it possible for  
12          them to get their product out there so they can be  
13          seen. Hopefully, by a major and picked up. And, once  
14          again, this is only my opinion.

15                   And a lot of those performers,  
16          unfortunately also, are not AFTRA members. So, with  
17          them being unsigned and no members and things like  
18          that, and hopefully our members wouldn't work for  
19          them, so that would not increase our workload.

20                   ARBITRATOR VON KANN: Okay. Thank you.

21                   CHAIRMAN VAN LOON: The answer is yes.

22                   CHAIRMAN VAN LOON: You answer is yes.

1 MR. JOSEPH: The answer is yes, and I'll  
2 try to be brief. I don't know if I'll have a record,  
3 in fact I'm pretty confident I won't.

4 CROSS EXAMINATION

5 BY MR. JOSEPH:

6 Q Mr. Dorsey, my name is Bruce Joseph.

7 A Please.

8 Q I'm just going to -- likewise, to me --  
9 for me. And I'm just going to ask a few questions to  
10 try to understand how the code, the AFTRA code works  
11 with respect to background vocalists.

12 A Yes.

13 Q You had testified in your direct testimony  
14 that you were paid on the basis of per hour or per  
15 side.

16 A Yes.

17 Q What's the side?

18 A A side is a track. It would be like  
19 simply if I'd said do, ra, me, fa, recorded it do, ra,  
20 me, fa; that's another side and/or track. So it's  
21 doubling, tripling, quadrupling what I did.

22 Q Now, you spoke of the various work you did

1 in a session, the arranging and working with the  
2 royalty artist.

3 A Yes.

4 Q On a typical recording session, how many  
5 sides would be worked on?

6 A It would depend on the song. I mean, if--  
7 it could be -- say if it's -- they want a choir sound  
8 and they only have four of us in there. So, I mean,  
9 to get a sound of 80 people you're going to do, you  
10 know, 10 tracks.

11 So, I mean, it depends on what the song  
12 requires, what the producer requires and -- and  
13 whatever vision they had is what we try and 99½ times  
14 out of 10 -- out of a 100, excuse me, that's what we  
15 give them.

16 Q And for that example you gave, how long  
17 might that take to do 10 tracks of choir sound?

18 A Well, with today's technology, they may  
19 just want us to do the vamp, which may be a chorus  
20 being repeated five times. And through digital  
21 technology, fly the choruses in other places. So, you  
22 may be there 2½ hours.

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1 Q 1½?

2 A Yes.

3 Q And would that be typical for -- in a  
4 given recording session -- I'm just trying to get a  
5 sense if you can give us one of --

6 A It's -- it's

7 Q Either how many hours or how many sides  
8 would be --

9 A And it's very difficult due to the  
10 differences of producers and/or royalty artists. You  
11 have some people who like to go in and hit it and get  
12 out of there. And you have other people who are a  
13 pain and want to be there all day, you know. And I  
14 said pain due to the fact that you have people, I  
15 mean, like a Streisand who is a perfectionist and it's  
16 not that she's -- you know, everyone says she's mean  
17 or this or that or the other. I mean, she just -- she  
18 wants you correct. So, I mean, then you have --  
19 you're going to put in a lot of time.

20 So then you weigh your time and sides when  
21 it comes down to what you'll receive as a payment.

22 Q So a side could take a lot of hours in



1 that kind of a situation?

2 A No, not a side. I mean, a side can take,  
3 you know, three minutes. But, I mean, if she's  
4 putting work, if she's -- this is flat, I want to  
5 change this. It's not necessarily the performance of  
6 that, but it's what they want out of the performance.  
7 So, you may do 20 sides, but it might take you 8  
8 hours.

9 Q Now, if you do 20 sides in 8 hours, do you  
10 get paid for the equivalent of 20 sides, which is  
11 equal to 40 hours?

12 A Yes.

13 Q And that's at double or triple scale?

14 A Yes, or single.

15 Q You typically work at?

16 A Double and triple.

17 Q And just to understand the contingent  
18 payments work, I don't know whether you have the code  
19 in front of you or does one of the exhibits to Mr.  
20 Hessinger's testimony, he will be testifying shortly.  
21 But on page 25, if you have it --

22 A Yes.

1           Q       I see, for example, for all other covered  
2 albums, and then there are a series of unit sales  
3 numbers. And at each unit sales number is a  
4 contingent scale factor of 50 percent.

5           A       Yes.

6           Q       Does that mean, for example, when the  
7 album sells 157,500 units you get a 50 percent  
8 contingent payment on top of the session fee?

9           A       Yes.

10          Q       And then when it hits 250,000 you get  
11 another 50 percent?

12          A       And that's broken down between the groups,  
13 if I'm not mistaken. And as far as the overall  
14 breakdown of the 50 percent factor, because as you're  
15 saying it, it's never happened to me as far as 157 get  
16 this, da, da, da, da. And if it has, it has been very  
17 rare. So, I mean, you would really -- for that  
18 question, because I'm versed on the code, but not well  
19 enough to give you the total ins and outs of it.

20          Q       Yes.

21                    ARBITRATOR VON KANN: So you say it's  
22 never happened -- I think you said at one point you

1 have hit the 157 mark once in a while, but not the  
2 next level, is that what you mean?

3 THE WITNESS: Yes. You know, I've hit the  
4 157. I mean, and I've also hit 3 million, and things  
5 of that nature. But, I mean, as far as my payments  
6 where you say it's 157, 200, 300 -- I mean, I never --  
7 for me, you know, I mean my accountants would be able  
8 to tell you pretty much more as far as how often, you  
9 know. And not being factious or anything, but I mean  
10 I don't -- as far as, you know, them keeping tracks of  
11 "Hey, Kevin, you just got something, you know, from  
12 Willie Nelson because he just sold 300,000."

13 BY MR. JOSEPH:

14 Q But the way it's structured, if he had  
15 sold 300,000 -- when it hit 250, that would be another  
16 50 percent?

17 A Yes.

18 Q And then at 375 another 50 percent?

19 A Yes, to my understand. Yes.

20 Q Okay.

21 MR. JOSEPH: I have no further questions.

22 CHAIRMAN VAN LOON: Anything else on

1 cross?

2 Anything, Mr. Levine, on redirect?

3 MR. LEVINE: Just one.

4 REDIRECT EXAMINATION

5 BY MR. LEVINE:

6 Q Are there other reasons why background  
7 vocalists might prefer not to perform on sound  
8 recordings? Are you aware of some background  
9 vocalists who choose not to perform on sound  
10 recordings?

11 A No.

12 Q No?

13 A I mean, with the exception -- I mean,  
14 sound recordings. If you say "Kevin, do you want to  
15 do an album or do you want to do a national Toyota  
16 spot?" I'll gamble on the Toyota spot, you know, I  
17 mean because I know the Toyota's going to be there and  
18 the sound recording, like I said, didn't make it, it  
19 may end up on a -- in a can on the shelf, you know.

20 Q If streaming by webcasters substitutes for  
21 sales, if that happens, the level of sales which  
22 increase your contingent payments which Mr. Joseph was

1 just referring to would likely diminish, wouldn't  
2 they?

3 A Could you repeat the question, please?

4 Q Certainly.

5 A Thank you.

6 Q If streaming substitutes for sale, if  
7 webcasting substitutes for sales, in other words if  
8 because people are able to get it through webcasting  
9 they don't buy the sound recording, that would have an  
10 effect on the number of sound recordings sold, which  
11 would have an effect on raising your levels of  
12 contingent payments, is that correct?

13 A Yes, it would pretty much no longer exist.

14 Q Thank you.

15 MR. LEVINE: I have no further questions.

16 MS. SCHAEFFER: I just have a couple of  
17 questions on recross.

18 RE CROSS EXAMINATION

19 BY MS. SCHAEFFER:

20 Q Sorry. You'll be out of here soon, sorry,  
21 Mr. Dorsey.

22 CHAIRMAN VAN LOON: And you said you do

1 have a couple of questions on recross?

2 MS. SCHAEFFER: Just one or two. Thanks,  
3 Your Honor.

4 CHAIRMAN VAN LOON: Okay.

5 BY MS. SCHAEFFER:

6 Q Mr. Dorsey, if streaming were to increase  
7 record sales, then I'm assuming -- sorry. Let me  
8 rephrase that. Wouldn't it be true that your  
9 contingent fees would increase?

10 A Yes.

11 Q And, Mr. Dorsey, I take it you have no  
12 evidence that any of the webcasting services in this  
13 proceeding have any negative impact on record sales,  
14 correct?

15 A I have no evidence, correct.

16 MS. SCHAEFFER: I have no further  
17 questions, Your Honors.

18 MR. LEVINE: I have no further questions.

19 CHAIRMAN VAN LOON: Thank you very, very  
20 much.

21 THE WITNESS: Thank you.

22 CHAIRMAN VAN LOON: And we want to wish

1 you all the best on Saturday.

2 THE WITNESS: Thank you.

3 CHAIRMAN VAN LOON: Hope that that goes  
4 well.

5 THE WITNESS: Thank you. I hope so, too.

6 CHAIRMAN VAN LOON: Thank you very much.

7 THE WITNESS: Thank you.

8 ARBITRATOR VON KANN: Who brought the  
9 rice?

10 CHAIRMAN VAN LOON: Whose singing at his  
11 wedding?

12 THE WITNESS: Dale Perry, James Ingram,  
13 Howard Hewitt and myself.

14 CHAIRMAN VAN LOON: And you're the bass,  
15 right?

16 THE WITNESS: I sing bass as second tenor.

17 (Whereupon, the witness was excused.)

18 CHAIRMAN VAN LOON: And let's see, Mr.  
19 Garrett, who will our next witness be?

20 MR. GARRETT: Mr. Hessinger.

21 CHAIRMAN VAN LOON: Mr. Hessinger. Okay.

22 And we're ready to proceed with the next

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1 witness.

2 Whereupon,

3 GREG HESSINGER

4 was called as a witness by Counsel for the American  
5 Federation of Television and Radio Artists and having  
6 been first duly sworn, assumed the witness stand and  
7 was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. LEVINE:

10 Q Would you please state your full name?

11 A Greg Hessinger.

12 Q And what is your current position?

13 A I'm the National Executive Director of  
14 AFTRA.

15 Q Mr. Hessinger, could you give a brie  
16 résumé of your educational experience?

17 A Sure. After graduating law school in  
18 1990, I went to work for Skadden Arps Slate Flarm in  
19 New York and also here in Los Angeles.

20 After that, I went to work for  
21 Westinghouse Broadcasting, which later -- soon  
22 thereafter merged with CBS. I spent a total of 4



1 years with Westinghouse and CBS, and then came to work  
2 for AFTRA originally as Assistant National Executive  
3 Director, and then a year ago became the National  
4 Executive Director.

5 Q And what is AFTRA?

6 A AFTRA, I should probably spell out the  
7 name, American Federation of Television and Radio  
8 Artists. We're a labor union that represents  
9 approximately 80,000 performers and broadcasters in  
10 the businesses of news, entertainment, advertising and  
11 sound recordings.

12 Q And you represent both features and  
13 nonfeatures vocalists, is that correct?

14 A Correct. In the sound recordings  
15 business, we represent approximately 15,000 vocalists,  
16 11,000 of whom are background singers and 4,000 of  
17 whom are royalty artists.

18 Q And what is a royalty artist as contrasted  
19 to a background singer?

20 A A royalty artist is a singer that enters  
21 into a contractual relationship with the record label.  
22 A fundamental feature of a royalty contrast is that

1 the singer receives a royalty on each record that is  
2 sold. Another features of those contracts is that in  
3 almost all of the cases the production costs are born  
4 by the artist and roughly half of the promotional  
5 costs as well as the touring costs and the video costs  
6 are born by the artist. And generally what will occur  
7 is there will be an advance of some kind given to the  
8 artist in the form of cash, and also the label will  
9 front those costs that are born by the artist under  
10 the contract. And then those costs are recouped  
11 before the artist actually starts receiving the  
12 royalties under the agreement.

13 Background singers are employed completely  
14 differently. They are engaged for sessions, they  
15 receive session payments under the sound recordings  
16 code that AFTRA has with the record labels. And  
17 generally, they will not receive any additional  
18 compensation beyond the session payment they receive  
19 when they perform, unless an album is very successful  
20 and hits certain contingent scale plateaus in the  
21 sound recordings code, the lowest of which is 157,000  
22 in sales. And most records do not hit that mark.

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1 Q And Exhibit A to your testimony is the  
2 AFTRA National Code of Fair Practice Sound Recordings,  
3 is that the code you're referring to?

4 A That is what I refer to as the sound  
5 recordings code.

6 ARBITRATOR VON KANN: Have you come to  
7 grips with the dilemma that now under the Digital  
8 Copyright Act the nonroyalty artists will be getting  
9 royalties?

10 THE WITNESS: Happily so.

11 ARBITRATOR VON KANN: So you'll have to  
12 come with a new name.

13 BY MR. LEVINE:

14 Q Speaking of the digital Performance Right  
15 and Sound Recordings Act and the Digital Copyright  
16 Act, was AFTRA involved in the efforts leading up to  
17 the passage of those acts?

18 A Yes, we were. We were actively involved  
19 in lobbying for the passage of both the '95 and '98  
20 acts.

21 Q You discuss royalty artists and some of  
22 their payments. Would you say that creating sound

1 recordings and performing on sound recordings is an  
2 easy busy for royalty artists?

3 A No, it is not. I mean, almost uniformly  
4 you will hear that from the artists themselves. It is  
5 a -- it's a difficult business, obviously one they  
6 choose to go in, but it -- it's a tough business in a  
7 sense that you -- and generally the way it will work,  
8 as I said, is he'll go in and he'll get an advance,  
9 which for most artists will represent the only  
10 compensation they actually receive for the album  
11 because the overwhelming majority of albums do not get  
12 to a position of being recouped.

13 If I can just use an example and the  
14 numbers may not necessarily be realistic for any given  
15 artist, but if you had a situation where an artist was  
16 given, say, a \$10,000 advance to do a recording. And  
17 the label also were to front \$250,000 in costs to  
18 produce that album, and the royalty agreement itself  
19 provided that the artist would receive, say, \$1 for  
20 every album sold. In a situation like that, you would  
21 literally have to sell 260,000 units before that  
22 artist would see another dime.

1                   So, in most cases artists remain in the  
2 position of being unrecouped, is the term that is  
3 used. And, in fact, the unrecouped position then gets  
4 transferred to future works. And the unrecouped  
5 balance continues to build so that there are just many  
6 recording artists who do not receive any additional  
7 compensation beyond the advance that they are given.

8                   Q       And you mentioned a \$1 in your example.  
9 What would you say typically royalty artists might  
10 earn per -- for each record sold.

11                  A       Generally I would say a dollar is a fair  
12 number for an artist to be at. Some are lower than  
13 that, some go a little higher. The very successful  
14 artist who has a track record who can command better  
15 terms in their royalty agreement might get to a level  
16 of, say, \$2.40. But if you're at a dollar, you're  
17 doing okay.

18                  Q       And we've heard some from Mr. Dorsey, is  
19 there anything you'd like to add as to how background  
20 singers are compensated?

21                  A       Other than to stress the fact that most  
22 background singers do not ever see additional

1 compensation beyond the session payments that they  
2 receive when they perform the work. I think Mr.  
3 Dorsey's testimony very well characterized how they're  
4 employed and how they're compensated.

5           You know, we have, as was alluded to in  
6 Mr. Dorsey's testimony, health and retirement plans  
7 that the record labels contribute into under the sound  
8 recordings code. And in order to qualify for benefits  
9 under those plans, one must have contributions made on  
10 earnings of at least \$7500 per single coverage and  
11 \$15,000 for family coverage. Many, many background  
12 singers never reach those thresholds in a given year.  
13 They do not reach an amount of annual compensation of  
14 \$7500 or \$15,000 to qualify for those benefits.

15           Q       What is Sound Exchange?

16           A       Sound Exchange is an organization that was  
17 formed by the record labels, essentially to collect  
18 and distribute monies under the '95 and '98 Acts.  
19 AFTRA is a member of the board of Sound Exchange.  
20 We're really there in the role of a watchdog, if you  
21 will, to ensure that artists receive the monies they  
22 are owed under the law and to ensure that

1 administrative costs and other factors bear some  
2 relation to what is reasonable. And that is the role  
3 that we are playing at this point on Sound Exchange.

4 Q Who else are members of Sound Exchange?

5 A The record labels, the major record labels  
6 all have representatives. There are also artists  
7 representatives. The American Federation of Musicians,  
8 Amy Mann, who is a recording artist and David  
9 Sanborne, whose a musician and a recording artist are  
10 also members.

11 Q Are the royalties collected and  
12 distributed by Sound Exchange recoupable?

13 A No, they are not. There's an agreement  
14 between AFTRA and the record labels that provides that  
15 those amounts are not recoupable.

16 Q You've said in your written testimony that  
17 the monies collected from webcasters is real money.  
18 What do you mean by that?

19 A Well, it's real money in the sense that it  
20 is not recoupable, so that any monies that are  
21 collected and go through Sound Exchange will be real  
22 money in the pockets of performers.

1           In the context of the business that I  
2 described earlier, where -- first of all, we're  
3 sitting here talking about royalties for digital  
4 transmissions. I think, you know, as everyone knows,  
5 that for broadcast transmissions that artists receive  
6 no royalty. So you're talking about an existing  
7 business where for broadcast transmissions of their  
8 work product, artists receive no compensation and  
9 under the traditional model of selling CDs, they will  
10 often receive, either in the case of royalty artists,  
11 an advance and then no further payment or in the case  
12 of session singers or background singers, a session  
13 payment and no further payments. You're talking about  
14 now a new revenue stream being created where there is  
15 literally an entire business being built upon nothing  
16 other than exclusively the work product of these  
17 performers. So, it is real money in the sense that  
18 it's not recoupable. It's real money in the sense  
19 that it may be just about the only money that artists  
20 are receiving. And, you know, we think it's -- it  
21 should be real money in the sense of the amount, in  
22 the sense that you have an entire business being built

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1 upon the work product of these performers.

2 Q Ms. Schaeffer asked Mr. Dorsey whether he  
3 would be able to sing if there were no words and there  
4 were no music. What would the webcasters have to do  
5 if there were no sound recordings created that they  
6 could webcast that they could stream through their  
7 webcasting?

8 A They either could compete with everyone  
9 else and try and create some flashy text that is going  
10 to attract viewers, or they could stay in the business  
11 that they're trying to get into, which is to  
12 distribute sound recordings through their websites,  
13 and that would entail having to engage talent at rates  
14 that under the sound recordings code I think were  
15 spoken about earlier, could in the grand scheme of  
16 things add up to a lot of money to engage talent to  
17 produce original recordings. And even then, those  
18 webcasters would be in the position of trying to  
19 distribute recordings of artists that the public may  
20 not be familiar with and would not have the ability to  
21 attract listeners the way they are able to attract  
22 listeners with existing recordings.

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1           It was also -- earlier the point was made  
2           that perhaps this creates additional work  
3           opportunities for singers. If in fact webcasters were  
4           to adopt the kind of model I just spoke of where they  
5           were going to engage talent to create original  
6           recordings. Then I think you would be talking about  
7           additional work opportunities.

8           What is currently happening, instead of  
9           using existing recordings, so you are talking about  
10          artists who already have been employed and there is no  
11          new work opportunity other than in the sense that one  
12          could argue that perhaps by promoting a record and  
13          increasing sales, that that could lead to future work  
14          opportunities. But certainly in the immediate sense,  
15          there is no new work opportunity for the artist.

16                   CHAIRMAN VAN LOON:     Mr. Levine, I  
17                   apologize. I neglected to ask you before sort of  
18                   roughly what order of magnitude you were expecting for  
19                   this direct.

20                   MR. LEVINE:    Oh, in terms of time?

21                   CHAIRMAN VAN LOON:    Yes.

22                   MR. LEVINE:    I would say another two

1 minutes.

2 CHAIRMAN VAN LOON: Two?

3 MR. LEVINE: Two or three.

4 CHAIRMAN VAN LOON: Please continue.

5 Perhaps five, but please continue.

6 BY MR. LEVINE:

7 Q Based upon your experience, do you believe  
8 that performers would prefer promotion to payment or  
9 payment to promotion?

10 A Well in a perfect world they would like  
11 both. I think in a fair world, they are entitled to  
12 both. If a website is created that is structured  
13 properly that attracts listeners, that should have  
14 promotional value and should increase record sales.  
15 In a fair world, since the only reason the listener is  
16 going to that website in the first place is to hear  
17 that artist, the artist should be compensated for the  
18 business that is being built by that webcaster.

19 Q How do you believe the webcasting rate  
20 should be set?

21 A One would certainly think that the place  
22 to look is the fair market since the statutory

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1 standard is a willing buyer and a willing seller.  
2 There has been a marketplace, and there have been  
3 willing buyers and willing sellers. To me that would  
4 certainly seem to be the best indication of what that  
5 market value is.

6 MR. LEVINE: Thank you. I believe I kept  
7 within my allotted.

8 CHAIRMAN VAN LOON: You did even better.

9 MR. LEVINE: I spoke faster.

10 CHAIRMAN VAN LOON: At this point, let's  
11 plan to take the first afternoon break. We will  
12 resume at 20 past.

13 (Whereupon, at 3:05 p.m., the proceedings  
14 went off the record, and went back on the record at  
15 3:21 p.m.)

16 CHAIRMAN VAN LOON: Mr. Rich, will you be  
17 conducting the first cross?

18 MR. RICH: I will.

19 CHAIRMAN VAN LOON: Before we proceed with  
20 that, I am reminded by the legal staff that they need  
21 the written confirmations of the release on the  
22 materials that we talked about about a week ago.

1 These are the --

2 MR. RICH: The email confirmations which  
3 I received.

4 CHAIRMAN VAN LOON: Exactly. Right. I  
5 believe you have them from three clients. Is that  
6 correct? Then if someone could convey to Ms. Woods to  
7 Mr. Garrett. Staff also needs just a one paragraph  
8 from RIAA consenting to the release of the materials  
9 that we discussed last week.

10 MR. RICH: Is there a motion?

11 CHAIRMAN VAN LOON: It's your motion.

12 MS. WOODS: Okay. What point exactly do  
13 we need to address in the paragraph? Obviously we  
14 made the motion.

15 CHAIRMAN VAN LOON: I would just say  
16 confirming our -- I wouldn't have thought we needed a  
17 fourth one, but they would like four.

18 MS. WOODS: Okay.

19 CHAIRMAN VAN LOON: Just for their  
20 records.

21 MS. WOODS: Great.

22 CHAIRMAN VAN LOON: So when they are

1 hauled before Congress for breach of duty, they will  
2 have an answer.

3 MR. JACOBY: I think it also relates not  
4 only to the subject matter of their motion which was  
5 the decision, but also the testimony. That needs to  
6 be in there.

7 CHAIRMAN VAN LOON: That's an excellent  
8 point. That's right. It is the testimony related to  
9 the two witnesses as well. That's right. That  
10 exceeds the scope of the motion. Thank you very much.

11 Please proceed then, with the cross.

12 MR. RICH: Thank you.

13 CROSS EXAMINATION

14 BY MR. RICH:

15 Q Good afternoon, Mr. Hessinger. My name is  
16 Bruce Rich. I will be asking you a few questions on  
17 cross examination.

18 I would like to start about where you  
19 ended. You were asked by Mr. Levine as between  
20 promotion and a payment, which would one prefer. You  
21 properly suggested you would prefer the best of both  
22 worlds. That is understandable.

1                   You would agree, would you not, that  
2 broadcast radio has been an invaluable source of  
3 promotion in terms of promoting the sales of sound  
4 recordings. Isn't that accurate?

5                   A       I would agree that it has been a valuable  
6 source of promotion for sound recordings. I would not  
7 necessarily agree that the economic arrangements  
8 surrounding that promotional arrangement have been  
9 fair to artists.

10                  Q       But be that as it may, you would agree  
11 that given the status of artists' compensation  
12 arrangements, they are what they are at this point.  
13 We'll come back to that. But as between promotion by  
14 over-the-air broadcast radio in terms of their  
15 livelihood and well-being and the absence of such  
16 promotion, they have been far better off with such  
17 promotion. Correct?

18                  A       That is correct.

19                  Q       It would be fair so to conclude, would it  
20 not, with respect both to royalty artists, yes?

21                  A       Yes.

22                  Q       And with respect to background vocalists.

1 Correct?

2 A Yes.

3 Q That to the extent that over-the-air radio  
4 broadcast has promoted sales of sound recordings, it  
5 has enhanced the prospects that royalty artists will  
6 earn a stream of royalties beyond advances. Correct?

7 A Correct.

8 Q As to the background artists, enhances the  
9 prospects that one or more levels of contingent  
10 compensation might kick in. Is that correct?

11 A Correct.

12 Q So while we are all entering this brave  
13 new world of the Internet with lots of hypothesizing  
14 about the future, I take it you would also agree that  
15 to the extent the Internet proves to be an additional  
16 promotional vehicle for sales of sound recordings,  
17 that no differently AFTRA's members who are vocalists  
18 on sound recordings likewise given existing  
19 arrangements would stand to benefit from enhanced  
20 sales of sound recordings. That would enure directly,  
21 potentially directly to their economic advantage. Is  
22 that correct?



1           A        To the extent that the webcasting of sound  
2 recordings would promote the sale of sound recordings,  
3 that would be correct.  Although certainly in the  
4 artists' mind I know, having spoken to many of them,  
5 there is a balance that is struck in their mind as to  
6 whether the extent of promotional value that one gets  
7 from having the product used in that fashion is to  
8 such a degree that it would offset what they would  
9 perceive as the injustice of not being adequately  
10 compensated for the use of that product.

11                        In other words, when you promote the sale  
12 of a record through a webcast, at least three parties  
13 would benefit if it's done properly.  The webcaster  
14 would benefit in a sense that they are building a  
15 business and generating revenue through that business.  
16 The record company would benefit in the sense that  
17 they are selling more records and realizing more  
18 profits.  The artist might benefit in the sense that  
19 they may hit either the contingent skill plateaus or  
20 get to a recoup position where they are receiving more  
21 royalties.

22                               All three parties could benefit.  I think

1 what we are really talking about is what is the fair  
2 division of that benefit. The artists' perspective,  
3 and I think the right perspective is that as the  
4 creators of the work, they should share the lion's  
5 share of the profit that is generated.

6 Q Now you talked about -- Mr. Levine asked  
7 you toward the end of your examination for your  
8 opinion as to the basis on which compensation among  
9 others to recording artists ought to be based under  
10 the DMCA. Do you remember being asked that question  
11 and giving a response to it?

12 A I think so, yes.

13 Q You cited the free marketplace as you  
14 termed it, and as your written direct testimony termed  
15 it, in which you testified a series of agreements have  
16 been reached. You suggested consistent with the RIAA  
17 case in chief, that that forms in your judgement an  
18 adequate basis for compensation to be established by  
19 the Panel. Is that roughly correct?

20 A That is correct.

21 Q Okay. Now have you any specific knowledge  
22 about the particular circumstances in which any of the

1 agreements which you generally refer to in your  
2 testimony were reached between the RIAA and the  
3 individual webcasters involved?

4 A I am not aware of any circumstances that  
5 would give me reason to believe that those were not  
6 arms length transactions, but I am also not intimately  
7 familiar with the details of the transactions either.

8 Q But do you have any knowledge of any  
9 specifics of any of the transactions?

10 A Only what has been reported publicly.

11 Q Did you participate in any of the  
12 negotiations, whether through any arm of the RIAA or  
13 otherwise?

14 A No.

15 Q Okay. Now when you use the term "free  
16 marketplace" in your written testimony and in your  
17 oral testimony, what do you mean by that?

18 A Well, I will start with the statute that  
19 refers to a willing buyer and a willing seller. To  
20 me, those deals represented transactions between  
21 willing buyers and willing sellers. The statute does  
22 not dictate the relative bargaining strength that

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1 either party brings to that transaction. It only  
2 dictates that the buyer be willing and the seller be  
3 willing. I believe, based upon what I know, that  
4 willing buyers and willing sellers entered into those  
5 transactions.

6 Q By your understanding of free marketplace,  
7 historically have AFTRA's members dealt with the  
8 recording labels in a free marketplace?

9 A Yes.

10 Q If so, why the need for a labor union?

11 A Well, like I said, a free market does not  
12 dictate the relative strength that either party brings  
13 to the bargaining table. We believe, and the artists  
14 believe, that they bring greater strength to the  
15 bargaining table by collecting their strength and  
16 approaching the labels in a collective way rather than  
17 individually. That is the need for a labor union,  
18 that sometimes one can enhance one's bargaining  
19 leverage in a free market by organizing collectively.

20 Q How would you describe from your  
21 experience, the relative strength of the parties, that  
22 is as between the record industry on the one hand and

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1 AFTRA's members dealing with individual labels on the  
2 other?

3 A Are you referring to the bargaining  
4 relationship in their individual capacity?

5 Q Yes.

6 A Certainly the record labels have been  
7 historically the gatekeepers, if you will, for the  
8 industry. They do bring more clout to the bargaining  
9 table than most individual artists. When you have a  
10 very successful artist, they obviously do bring more  
11 power to the table. But in a general sense, most  
12 artists have less power coming to the table than the  
13 labels do.

14 Q In the absence of something akin to the  
15 National Code of Fair Practice, which is annexed as  
16 appendix I to your testimony, what would the outcome  
17 of a negotiation between a typical, not a star royalty  
18 artist, but a typical royalty artist or a typical  
19 background vocalist be in a marketplace negotiation  
20 between that artist and a given record label?

21 A In the absence of sound recordings code  
22 and the background singer was --

1 Q Left to their own devices.

2 A I am quite confident it would be less than  
3 terms provided for by the sound recordings code.

4 Q And less than what you would regard to be  
5 a fair market value for the contributions made by  
6 those artists?

7 A I would distinguish between fair market  
8 value and what I would consider to be objectively or  
9 subjectively fair. Fair market value is the price  
10 upon which in a free market a willing buyer and  
11 willing seller can agree upon a price. I might not  
12 look at the price that is agreed upon as being fair,  
13 but it would reflect the fair market value.

14 Q And so as you see the function of AFTRA,  
15 it is to in what you would term a more objective sense  
16 assure fair compensation to AFTRA's members?

17 A That is correct. I mean fair market value  
18 is almost a misnomer. It's really free market value.

19 Q Do you see a distinction?

20 A I do, in the sense that we are seeking to  
21 bargain terms that are fair to artists, that  
22 compensate them in a manner that we think reflects the

1 value they bring to the process. But that generally  
2 is frankly a price that is above what the free market  
3 would command.

4 Q So if I understand your testimony, fair or  
5 reasonable, to use an interchangeable word if I might,  
6 compensation, in your experience would not be the  
7 byproduct of negotiations between AFTRA's members and  
8 individual labels, absent union intervention? Is that  
9 correct?

10 A I'm sorry. I have to ask you to repeat  
11 that question.

12 Q I understand your testimony that while the  
13 "free marketplace" would yield some levels of  
14 compensation, whatever they would be, they would not  
15 in your estimation, dealing now with the typical non-  
16 star AFTRA recording artist, they would not yield fair  
17 or reasonable compensation, even though they would  
18 result from free market negotiations. Correct?

19 A In the case of background singers, I  
20 believe that is correct.

21 Q What about in the case of royalty artists  
22 other than the Streisands of the industry?

1           A       I would also suggest that would be  
2 correct.

3           Q       Now your testimony, your written testimony  
4 and your oral testimony does talk about advances. I  
5 believe you talked about two components of advances  
6 typically. Is that right? A royalty advance and an  
7 advance of the costs of creating new recording and so  
8 forth?

9           A       Yes.

10          Q       What, in your experience, is the typical  
11 range -- strike typical. What is the range of royalty  
12 advances that you are aware of from the low end to the  
13 high end, and maybe if there is a median.

14          A       Yes. Median would be tough. It is just  
15 a very, very wide spectrum. I think if you get into  
16 10, 12, 15,000 range, that's okay, not unusual. But  
17 it's also in the case of a star, big star, you can get  
18 into millions. So you are literally talking about  
19 that kind of range. It's really something that  
20 depends upon all the different circumstances such as  
21 what kind of track record the artist has, what kind of  
22 production costs are going to be incurred in the



1 current recording, just many, many factors.

2 Q I take it that irrespective of the sales  
3 success of the sound recording of the album, the  
4 royalty advance remains with the artist. Is that  
5 correct?

6 A The cash advance, yes.

7 Q Cash advance.

8 A That is correct.

9 Q There is no effort to recover that in the  
10 event that it doesn't earn out. Is that correct?

11 A That is correct. But please don't give  
12 the labels any ideas.

13 Q Just the fact.

14 A Just kidding.

15 Q Now in both your written testimony and  
16 your oral direct testimony, you discussed the desire  
17 of AFTRA's vocalists to earn what your testimony terms  
18 "real money" arising out of the opportunities  
19 presented under the DMCA. Is that correct?

20 A Yes, that is correct.

21 Q If I understood the gist of your response  
22 to Mr. Levine's questioning, in part at least when you

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1 used the term "real money," you are trying to  
2 distinguish from current practice. For example, the  
3 recoupment practices that prevail in the industry. Is  
4 that correct?

5 A That is correct.

6 Q And I take it that there is at least  
7 implicit in that testimony the sense that those  
8 practices are less than fair or at least generate less  
9 than the full value of the contribution of the AFTRA  
10 recording artists in connection with the sales of  
11 sound recordings under present practice. Is that  
12 correct?

13 A The practice is what it is. If you asked  
14 most recording artists, I think they would certainly  
15 prefer that the recoupment, current recoupment system  
16 be revised in some manner.

17 Q Now am I correct that sitting to Mr.  
18 Levine's left is one of your colleagues, Ms.  
19 Chaitovitz?

20 A That is correct.

21 Q For the record, can you tell me what her  
22 position is at AFTRA, please?

1           A       She is the National Director of Sound  
2 Recordings for AFTRA.

3           MR. RICH: I would like to mark a document  
4 which we have pre-marked as SX-19.

5                               (Whereupon, the document was  
6                               marked for identification as  
7                               Exhibit No. SX-19.)

8           MR. RICH: We have not sequentially  
9 numbered. While I will be marking both 18 and 19 for  
10 the Panel's advice, we had pre-marked a document as  
11 SX-17, but it will not be offered into evidence. So  
12 there will be a gap.

13           CHAIRMAN VAN LOON: I think in the future  
14 on both sides it would be helpful if we began the  
15 distribution with opposing counsel and then the  
16 witness, and then back around so that they have an  
17 opportunity to look.

18                               BY MR. RICH:

19           Q       Now I will indicate for the record, Mr.  
20 Hessinger, that we obtained this document off of a  
21 website as listed at the footer of this, styled  
22 artists against piracy.com. It appears to be a

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1 position paper of AFTRA on the subject of works and  
2 made for hire.

3 I would ask you to turn to the third page  
4 from the back, which carries a respectfully submitted  
5 line, Ann E. Chaitovitz. Do you see that?

6 A (No response.)

7 MR. LEVINE: Your Honor, if I may, I would  
8 like an opportunity to look at this to determine  
9 whether I am going to object to this whole line of  
10 questioning.

11 MR. RICH: Sure.

12 CHAIRMAN VAN LOON: We would like to hear  
13 a little bit more in terms of foundation.

14 MR. RICH: I was going to try and lay a  
15 foundation.

16 MR. LEVINE: You also might give Ms.  
17 Chaitovitz an opportunity to look at it more closely.

18 BY MR. RICH:

19 Q Do you recognize this document, not  
20 necessarily in the form in which I have handed it to  
21 you, but as to its content and substance?

22 A It does look like a document that we

1 prepared in connection with the work for hire  
2 legislative process. I honestly cannot fully  
3 recollect in what context this was submitted, whether  
4 this is the final version of what was submitted.  
5 Those things I can't sitting here commit to you. But  
6 it does look like something that we had worked on.

7 Q Do you recall in fact that AFTRA prepared  
8 a position paper on the subject of the work for hire  
9 provisions of the Copyright Act?

10 A Yes.

11 Q And for the Panel's benefit, could you  
12 provide the context and circumstances which I believe  
13 had a legislative impetus for the creation of this  
14 position paper?

15 A (No response.)

16 MR. LEVINE: I am going to object, simply  
17 because this has absolutely nothing to do with Mr.  
18 Hessinger's direct testimony at all. He testified  
19 about the DMCA and the Digital Performance Right and  
20 Sound Recording Act. He has not testified about work  
21 for hire. There's nothing about work for hire in his  
22 written or oral testimony.

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1 MR. RICH: It will become apparent, Your  
2 Honors, that section B of this document, beginning at  
3 page 7, speaks to recoupment practices, speaks to the  
4 relative creative contributions as between recording  
5 artists and the record labels. It is intimately  
6 related to the witness' testimony. Again, I was  
7 merely trying to provide a contextual basis for the  
8 discussions that occur in here, and not separately go  
9 off on a substantive tangent about the work made for  
10 hire doctrine.

11 CHAIRMAN VAN LOON: Overruled.

12 BY MR. RICH:

13 Q Mr. Hessinger, could you tell us a little  
14 bit of the relevant background that prompted the  
15 creation of this position paper so we have it in  
16 context?

17 A Yes. There has been a longstanding legal  
18 question as to whether sound recordings constitute  
19 works made for hire. The significance, the  
20 distinction being that if they are deemed to be works  
21 made for hire, they would not fall under the otherwise  
22 applicable rule under copyright law that the ownership

1 of the copyright for the sound recordings would revert  
2 to the creator after 35 years.

3 The recording industry for a number of  
4 years took the position that sound recordings were  
5 works made for hire. AFTRA and other artists groups  
6 believe that they were not, and felt relatively  
7 comfortable with our legal position on that point.

8 The recording industry, and I am not going  
9 to be able to recite the dates here specifically right  
10 now, but managed to gain passage of a law that  
11 specifically provided that sound recordings were works  
12 made for hire. Thus, removing the ambiguity in the  
13 law to the extent there was any. We then --

14 Q May I interrupt you just to ask a  
15 question. Did AFTRA have occasion at the time of that  
16 effort to give its own input legislatively and its own  
17 position to the Congress on that subject?

18 A No.

19 Q Why not?

20 A It was done in the context of an amendment  
21 to a bill. I think it was actually done by a  
22 congressional staffer very late in the legislative

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1 process and was passed without any opportunity for  
2 AFTRA to comment.

3 It is no secret that we were not happy  
4 about the process through which that occurred. I  
5 think that was publicly reported and we would not deny  
6 that. Nevertheless, it was passed by Congress, and  
7 then it was incumbent upon us to try and do something  
8 about that. We launched a legislative effort to  
9 overturn the legislation, to restore the law back to  
10 its pre-existing form, which we think supports our  
11 position that sound recordings are not works made for  
12 hire.

13 Ultimately, the recording industry agreed  
14 to have such legislation passed. That legislation was  
15 passed I guess about a year ago.

16 Q It was in that context that either this  
17 document or a document similar to this document was  
18 created by AFTRA?

19 A That is correct.

20 Q Now if you turn to page 7 of this  
21 document, please, under section B, there is a  
22 discussion beginning in the third sentence which I



1 will read into the record as follows. "The record  
2 company acts like a mortgage bank and provides a loan  
3 to the performer to finance the recording in the form  
4 of an "advance." That advance is "recouped" by a  
5 record label when it deducts the advance from royalty  
6 payments owed to an artist for sales of that  
7 recording. However, unlike a mortgage bank, the  
8 record company maintains ownership of the work, even  
9 after the artist has "paid back" the advance. Imagine  
10 the absurdity of the bank still owning your house  
11 after you have paid off the mortgage! Although not  
12 every recording recoups, (i.e. pays the loan back),  
13 virtually every recording that still has value after  
14 35 years has fully recouped its advance payments."

15 An accurate reflection of AFTRA's  
16 sentiments at or about the time of this legislative  
17 issue?

18 A Correct.

19 Q Now in the next paragraph, this statement  
20 goes on to state in the middle of the first sentence  
21 which begins, "Moreover, records are much less  
22 collaborative." It states, "The record company makes

1 negligible creative contribution."

2 Do you know what that is a reference to?

3 A We certainly view the creative process as  
4 being dominated by or the most valued contributions  
5 being provided by the artists. The record company  
6 provides the capital to make a record happen, but it  
7 is the artist who provides the creativity.

8 Q So I take it the next sentence which lays  
9 out that sentiment also accurately reflects AFTRA's  
10 views. Namely, "a record album consisting of featured  
11 recordings of several musical compositions has  
12 generally been brought together by the featured  
13 recording artist who as required by his/her contract  
14 delivers recorded albums as a set of master tapes  
15 completed, fully edited, mixed, leaedered, and  
16 equalized."

17 Is that an accurate synopsis of AFTRA's  
18 view of the relative creative contributions as between  
19 recording artists and the record companies?

20 A Yes.

21 MR. RICH: Subject to Mr. Levine and/or  
22 Ms. Chaitovitz having an opportunity to verify that

1 this is the position paper created, we would like to  
2 offer this in evidence.

3 MR. LEVINE: It is very difficult sitting  
4 here to know what was created a year ago.

5 CHAIRMAN VAN LOON: We have had the prior  
6 arrangement that we have admitted it provisionly so  
7 that if you go back and check, do a download from the  
8 website. If it doesn't match up, we can come back and  
9 revisit the question. The burden is on you to do the  
10 checking. But otherwise, we're going forward.

11 Is that acceptable?

12 MR. LEVINE: Fine. Yes, surely.

13 CHAIRMAN VAN LOON: Then we'll admit this.

14 (Whereupon, the document  
15 previously marked for  
16 identification as Exhibit No.  
17 SX-19 was admitted into  
18 evidence.)

19 BY MR. RICH:

20 Q Turning now to DMCA, I take it, Mr.  
21 Hessinger, that AFTRA regards the royalty provisions  
22 of section 114 G2 as of importance to its members.

1 Correct? If you don't memorize, and I hope you don't  
2 go to sleep memorizing these numbers as the rest of us  
3 have to in these subdivisions, I will represent to you  
4 that that sets forth the allotments and allocations to  
5 the artists of a portion of the receipts from the  
6 statutory license.

7 A We do consider it important, yes.

8 Q Okay. That provision provides that two-  
9 and-a-half percent of receipts from statutory  
10 licensing are to be distributed to non-featured  
11 vocalists. Correct?

12 A Yes.

13 Q Yes?

14 A Yes.

15 Q You have to verbalize.

16 A Usually I'm over there.

17 Q And that 45 percent of receipts on a per  
18 sound recording basis are to be allocated to the  
19 featured recording artist. Is that correct?

20 A That is correct.

21 Q Now I take it from your testimony before  
22 and from the record generally, that presently the

1 system is set up such that the record companies are  
2 first to collect the statutory license fees, for  
3 example, through the Sound Exchange, and then remit  
4 the statutorily-prescribed sums to recording artists.  
5 Is that your understanding how the process works?

6 A Yes. Although the process of how the  
7 payments get remitted I think is still something that  
8 everyone is trying to work through.

9 Q But as of today, a snapshot of today, have  
10 I correctly stated what the flow of monies would be?  
11 Namely, through an intermediary such as Sound  
12 Exchange, and then disbursed to the artist? Is that  
13 correct?

14 A That is correct.

15 Q I take it from the answer prior, there are  
16 still some concerns on the part of AFTRA with respect  
17 to such a process. Is that correct?

18 A AFTRA supports direct payment of the  
19 artist monies to the artists. Whether that is  
20 mandated legislatively or by Sound Exchange, or  
21 through mutual agreement, the precise form that it  
22 takes is not as important as ensuring that artists get

1 every dime that they have coming to them under the  
2 law.

3 Q Why is this of importance to AFTRA,  
4 namely, as I understand it, the desire to cut out any  
5 middle man and to have the money flow directly in the  
6 first instance to the artists?

7 A I think one does not have to impugn anyone  
8 else's character to reach the conclusion that you are  
9 better off having a direct line to the artist than  
10 having it go through other entities. It is not so  
11 much that we are suggesting that anyone is going to  
12 cheat as much as we just think it is cleaner and a  
13 more direct line of payment to the artist to have it  
14 paid that way.

15 Certainly, one could conclude that in an  
16 industry as large as the record business, that there  
17 may be situations where the entities through which the  
18 money would be flowing deserve to have their character  
19 impugned, and we want to avoid that as well.

20 MR. RICH: Let me show you next what we  
21 have pre-marked as SX-18.

22 (Whereupon, the document was

1 marked for identification as  
2 Exhibit No. SX-18.)

3 BY MR. RICH:

4 Q This comes off of AFTRA's own website.  
5 Hopefully we'll be a little less uncertain as to its  
6 provenance.

7 According to the website, this reflects  
8 testimony of Ms. Chaitovitz offered to the House  
9 Subcommittee on Courts, the Internet and intellectual  
10 property in relation to oversight hearings on music on  
11 the Internet on or about May 17 of this year.

12 Are you familiar with this statement by  
13 Ms. Chaitovitz?

14 A Yes.

15 Q If you would turn to page 3 of this  
16 document, the second paragraph, I am not going to read  
17 it out loud, but if you would take a moment to read  
18 that. Does that paragraph accurately reflect on the  
19 subject you and I just discussed, AFTRA's position,  
20 namely that it is preferable for the reasons stated,  
21 that monies be disbursed directly to the recording  
22 artists?

1           A       Yes. That accurately conveys our feeling  
2 that it would be preferable.

3                   I should also note as a board member of  
4 Sound Exchange, that at least for the first year that  
5 the members of Sound Exchange have committed to pay  
6 the amounts to the artists without going through the  
7 record companies.

8           Q       I was going to ask you about that.

9           A       (No response.)

10                   CHAIRMAN VAN LOON: Is that a matter of it  
11 seems to me an agreement between AFTRA and Sound  
12 Exchange? Or how did that --

13                   THE WITNESS: We don't have a formal  
14 agreement. I made our views known in the context of  
15 Sound Exchange meetings that this is something that  
16 administratively was the best policy in terms of  
17 establishing the credibility of the organization was  
18 the best policy. The labels agreed.

19                   BY MR. RICH:

20           Q       May I ask you what form that agreement  
21 takes? Is it in written form?

22           A       There is no written agreement to that

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1 effect.

2 Q Is it a minuted, noted minuted agreement?  
3 Is it a handshake? Is it an oral series of  
4 undertakings? What is it?

5 A I would say we have oral understanding,  
6 buttressed by whatever pressure is gained from public  
7 statements that support the commitment that they have  
8 made.

9 Q This is a commitment for a one-year  
10 period?

11 A That is correct.

12 Q Running from when to when?

13 A I don't know the answer to that.

14 Q After the one year period expires, is  
15 there any understanding as to what transpires  
16 thereafter on this subject?

17 A There is no understanding, but I would at  
18 least say that the labels have certainly expressed in  
19 my view their understanding that it is in everyone's  
20 best interest to continue with that system.

21 Q Do you understand at least as a formal  
22 matter that one or more labels and/or the RIAA has

1 reserved the possibility of adopting the position that  
2 recouping is appropriate out of these monies,  
3 notwithstanding the present one you are understanding?

4 A I do understand they have reserved that  
5 legal position. We believe that legal position has no  
6 merit. That we have an expressed agreement to the  
7 contrary that if it became necessary to enforce that  
8 agreement, we would be able to do that. We just  
9 strongly believe that the monies under the Act are not  
10 subject to recoupment.

11 MR. RICH: I would offer SX-18 into  
12 evidence at this point.

13 MR. LEVINE: The same basis as the  
14 previous document. We don't object at this time.

15 CHAIRMAN VAN LOON: So admitted.

16 (Whereupon, the document  
17 previously marked for  
18 identification as Exhibit No.  
19 SX-18 was admitted into  
20 evidence.)

21 BY MR. RICH:

22 Q Now at the end of your statement, Mr.

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1 Hessinger, you do some math which leads to a rather  
2 astonishingly large number as to Spinner.com in the  
3 amount of \$134 million and change. You are familiar  
4 with that of course. Yes?

5 A Yes.

6 Q It would have to spend, you assert, more  
7 than that sum if it were unable to obtain a statutory  
8 license and therefore created this huge library of its  
9 own sound recordings. Correct?

10 A Correct. If one were to create the same  
11 kind of website with original content, then that would  
12 be --

13 Q I take it, I should not infer from that  
14 number that you regard that to be the fair and  
15 reasonable fee that Spinner.com should pay as a  
16 statutory license in this proceeding. Do I?

17 A You should not, and I'll tell you why. We  
18 believe that the royalty rates should be set at a  
19 level that reflects the contribution of the artists,  
20 which means that they should be as -- and the  
21 contribution of the artists being that essentially the  
22 entire new business is being built upon their work

1 product.

2 Where that leaves you is at the highest  
3 possible rate that can be commanded while still  
4 allowing for a sustainable business model. We want  
5 these new revenue streams to be developed. We want  
6 these businesses to be able to grow. But we feel very  
7 strongly that artists should be sharing to the fullest  
8 extent that they can while still allowing those  
9 businesses to do that.

10 MR. RICH: Let me have one moment to  
11 consult with my colleagues, please.

12 I have no further questions. Thank you.

13 CHAIRMAN VAN LOON: And are you the  
14 exclusive questioner from this side of the room?

15 MR. RICH: Oh no.

16 CHAIRMAN VAN LOON: Not by any means,  
17 okay. Who will we be hearing from?

18 MR. JOSEPH: I don't have anything.

19 MS. LEARY: We don't have anything.

20 CHAIRMAN VAN LOON: Mr. Joseph, Ms. Leary.  
21 Mr. Kirby?

22 So then the question is, is there further

1 redirect?

2 MR. LEVINE: Let me just confer with my  
3 colleagues, please. We have no redirect.

4 CHAIRMAN VAN LOON: Well then, Mr.  
5 Hessinger, thank you very much for being with us.

6 THE WITNESS: Thank you very much.

7 CHAIRMAN VAN LOON: Will we be next  
8 hearing from Mr. Kenswil?

9 MR. GARRETT: Yes, Your Honor.

10 CHAIRMAN VAN LOON: Before we launch into  
11 it, let me just ask as a planning matter what order of  
12 magnitude are you anticipating your direct would be in  
13 the time?

14 MS. WOODS: Forty five minutes.

15 CHAIRMAN VAN LOON: Forty five minutes?  
16 And having heard that you are not supposed to make  
17 estimates --

18 MR. STEINTHAL: I made an accurate one  
19 today, a one-for-one today.

20 CHAIRMAN VAN LOON: Do you have a sense of  
21 --

22 MR. STEINTHAL: I don't think it will be

1 more than 45 minutes.

2 CHAIRMAN VAN LOON: Okay. So we'll finish  
3 today, five witnesses.

4 ARBITRATOR VON KANN: How about other  
5 cross examiners on that side of the room? That's an  
6 hour and 45 minutes with a break.

7 CHAIRMAN VAN LOON: And we have a break.  
8 So this will be a test.

9 ARBITRATOR VON KANN: To try to finish by  
10 6:00 for your meeting.

11 CHAIRMAN VAN LOON: So welcome. Let me  
12 ask the court reporter to swear you in, please.  
13 Whereupon,

14 LAWRENCE KENSWIL  
15 was called as a witness, and after having first been  
16 duly sworn, was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MS. WOODS:

19 Q Mr. Kenswil, could you please state your  
20 full name for the record and spell your last name?

21 A Sure. Lawrence Kenswil, K-E-N-S-W-I-L.

22 Q And where are you currently employed, Mr.

1 Kenswil?

2 A I am employed by Vivendi Universal in its  
3 Universal Music Group Division.

4 Q What is your title?

5 A I am President of Universal Music Group's  
6 eLabs.

7 Q What was your previous position with  
8 Universal Music Group?

9 A I was Executive Vice President of Business  
10 and Legal Affairs for the Universal Music Group.

11 Q How long have you been with Universal  
12 Music Group?

13 A It will be 18 years in a few months.

14 Q Could you describe for us what Universal  
15 eLabs is?

16 A Sure. ELabs is a division that was  
17 started over two years ago to coordinate global  
18 strategies for the company's entry and participation  
19 in new technological and electronic spaces. That  
20 includes both online and off-line.

21 We do that in several ways. One is  
22 establishing new businesses through business

1 incubation, essentially growing them internally and  
2 launching them. Another way is forming -- taking  
3 investments in new companies that are doing things  
4 that are strategically aligned with us, as well as  
5 partnering with other companies to start new  
6 businesses that are strategically in line with our  
7 core business.

8 Finally, maybe just simply licensing our  
9 content to third parties without any sort of ownership  
10 involved, again, in businesses we feel are additive to  
11 our revenue lines. My main job is to increase revenue  
12 lines, increase sources of revenue for the company.

13 We also have R&D advanced technology  
14 people and marketing people within the organization.

15 Q You had mentioned that Universal eLabs or  
16 Universal has made some investments in some Internet  
17 companies. Could you give us some examples of those?

18 A Yes. Like any investors in Internet  
19 companies, we have been relatively unsuccessful,  
20 straight-forward investing. Unfortunately because as  
21 I said all our investments are with companies that are  
22 strategically aligned, and so naturally we want to

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1 succeed. There are examples from early investments in  
2 company InterTrust, which is a digital rights  
3 management software company, where we have a very  
4 small pre-IPO piece of the company, which is worth  
5 less than it was pre-IPO. We have an investment in a  
6 company called DataPlay, which is launching a new  
7 physical format for selling pre-recorded music. As  
8 well as a company that allows blank media format for  
9 sales to consumers. That company is still private.  
10 We have a small piece of that company in an agreement  
11 to release content on the format.

12 We had an investment in MusicBank, which  
13 unfortunately went south when VC money drying up for  
14 them. We have had an investment in Replay television,  
15 the TVO alternative, which was sold to -- just  
16 recently closed the transaction, was sold to Sonic  
17 Blue, which is another Internet -- not Internet, but  
18 technological startup. They manufacture MP3 players.

19 We have a few other small investments that  
20 are along those lines.

21 Q Thank you. Could you describe for us  
22 broadly what Universal Music Group is?

1           A       Yes.

2                   MR. JACOBY: Can we ask counsel to keep  
3 her voice up, please?

4                   MS. LEARY: I'm sorry. I am also having  
5 trouble hearing the witness.

6                   ARBITRATOR VON KANN: If both of you  
7 would, it would be good.

8                   CHAIRMAN VAN LOON: It is easy to lapse  
9 into a colloquy since you are right here, but you  
10 really have an obligation to tell the room, and while  
11 we're here in public session, the whole world about  
12 the facts and wisdom.

13                   THE WITNESS: I am very proud to tell  
14 about Universal Music Group to the whole world. We  
15 are the largest music company in the world. It became  
16 that when we merged with Polygram about two years ago.  
17 It is simply the corporate name for various operations  
18 around the world that we have in over 50 countries.

19                               We are the market share leader in most of  
20 those countries. We are the market share leader in  
21 the main record selling territories, except for Japan.  
22 We divide our operations among different operating

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1 divisions. Sometimes one country's operating division  
2 in larger territories such as the United States, we  
3 have many different operating business units, from  
4 various record labels, to distribution companies, to  
5 music publishing company, and other small investments  
6 and joint ventures.

7 So we basically have a large catalog of  
8 music, a large roster of artists, a large release  
9 schedule, and a lot of money invested by Vivendi  
10 Universal, who brought Universal last year into the  
11 business of music and sustaining its growth.

12 BY MS. WOODS:

13 Q What is the purpose of your testimony here  
14 today, Mr. Kenswil?

15 A My purpose is to help support the rate  
16 being requested by the sound recording producers in  
17 the CARP proceeding with the webcasters.

18 Q Have you reviewed the factors set forth in  
19 Ron Wilcox's public testimony as factors that were  
20 considered in entering into statutory, to licenses,  
21 DMCA compliant licenses?

22 A Yes. I saw the public testimony.

1 Q Did you -- let me back up and ask do you  
2 serve on the RIAA Negotiating Committee?

3 A Yes, I do.

4 Q What is your role on that committee?

5 A Mainly I help found it and since then I  
6 have been mainly supervisory of the people who take  
7 the day-to-day actions in licensing discussions.

8 Q That is on behalf of Universal Music  
9 Group?

10 A On behalf of Universal Music Group, yes.

11 Q If I could ask you to look at the factors  
12 listed on pages 3 and 4 of Ron Wilcox's public  
13 testimony, could you tell us a little bit about some  
14 of those factors that Universal Music Group considered  
15 important in evaluating RIAA Negotiating Committee  
16 licensing opportunities?

17 A Certainly. Well, the first one he  
18 mentions is one of the most important. If you are  
19 licensing music to a business that can take it or  
20 leave it, essentially, can have a business with or  
21 without music. Take for example a clothing store.  
22 They could sell clothing without having music on in

1 the background. As opposed to a company that cannot  
2 exist or a business that cannot exist without music.  
3 In other words, music is its product. Certainly that  
4 brings different value of the license to that company  
5 and affects the rates.

6 Another important factor is the fact that  
7 the music business as a whole worldwide over the last  
8 few years, for pre-recorded sound recording sales is  
9 either flat or falling. That seems to be a continuing  
10 trend. Our costs continue to rise. Therefore, it is  
11 imperative, thus, the reason I changed jobs. It is  
12 imperative for the companies to develop new lines of  
13 revenue and new sources of revenue to sustain the type  
14 of costs that it takes to finance, market, distribute  
15 music.

16 The fact is is that the owner of a  
17 copyright doesn't have to just rely on one stream in  
18 the sale of music. We should be able to rely like the  
19 movie business and many other content businesses, on  
20 a variety of streams of revenue to support our cost  
21 structure and bring a profit to the shareholders.

22 We look at whether or not there is a

1 promotional aspect to the deal. Certainly if there is  
2 distinct promotion given to our product for music that  
3 we wish to promote at the time that it's being  
4 promoted, that is a factor.

5 Secured music factor. We would like to  
6 see agreements that will have services, some  
7 contractual obligation for the services to respond to  
8 security threats and give us the ultimate right to  
9 pull out of the license if the security is compromised  
10 in a way that can't be fixed. This is very important  
11 to us over all of the new media businesses we're in.  
12 We are losing our business to unauthorized  
13 reproductions every where you look. We do not want to  
14 enter into new business which just exacerbates that  
15 problem.

16 Finally, we know that even though your job  
17 is to find what a willing buyer and willing seller  
18 would put together, the fact is is that since there is  
19 a license already, the law impels us to license our  
20 sound recordings. That in and of itself removes the  
21 ultimate leverage anyone brings to a bargaining table,  
22 the ability to get up and leave. So since we don't

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1 have that ability to refuse to make a deal, that takes  
2 into account what we're willing to receive as a result  
3 of that. It lowers it.

4 Q Turning back to your testimony and  
5 particularly to page 3 --

6 A (No response.)

7 ARBITRATOR VON KANN: I'm sorry. Did you  
8 just say we, we don't have the right to refuse to make  
9 a deal?

10 THE WITNESS: Yes. You have the right.  
11 The sound recording producers cannot keep those sound  
12 recordings off of the statutorily-licensed radio. As  
13 a result --

14 ARBITRATOR VON KANN: You have a right to  
15 not be willing to take any of the offers from the  
16 webcasters and say there were no agreements reached.  
17 The CARP will have to do it.

18 THE WITNESS: Correct. But that would not  
19 --

20 ARBITRATOR VON KANN: You didn't have to  
21 sign any of these deals.

22 THE WITNESS: No. That is one of the

1 reasons why we like signing them because we can get  
2 more in them than the CARP can possibly award in a  
3 license for pure monetary --

4 ARBITRATOR VON KANN: So you do have the  
5 right. Maybe this is semantic, but I mean you do have  
6 the right not to make a deal with anyone, and require  
7 that they go to the CARP.

8 THE WITNESS: We have the right not to set  
9 a rate with any of them. We don't have the right to  
10 keep our music off the services.

11 ARBITRATOR VON KANN: That's different.

12 THE WITNESS: In my mind, the quid is the  
13 music on the services and the pro quo is the payment.  
14 So the quid is not in the bid.

15 BY MS. WOODS:

16 Q Turning back to page 3 of your testimony,  
17 Mr. Kenswil, you describe there two arguments that you  
18 frequently hear from prospective licensees. I  
19 wondered if you could first tell us how you react when  
20 webcasters approach you and express concern about  
21 their ability to operate a profitable business.

22 A We are very sympathetic. It is very hard



1 to operate a profitable business. We certainly do not  
2 want to go through the hours and hours it takes to  
3 forming a deal in getting a rate set if the business  
4 is just going to go under the next day or the next  
5 year. It is just not worth our time.

6 So what we ask them, if they say no the  
7 rate you are asking for can't be profitable, we say  
8 okay, show us why. Show us what your P&L might look  
9 like. Show us where all your other money is going and  
10 we'll deal with it if we can.

11 But the fact is is that when they bring  
12 it, show us that they are paying more per song  
13 streamed to the backbone of the Internet, who doesn't  
14 provide any of that content than they are willing to  
15 pay us, we think something is out of whack. Maybe  
16 that is not a business that deserves to survive if  
17 that's the case.

18 We are not here to ensure good business  
19 models for Internet startups. Obviously that is a  
20 very difficult thing for anyone to do. What we want  
21 to do is create a revenue stream that will last. So  
22 if someone says well your license doesn't allow us to

1 stay in business so you have to reduce it so you get  
2 hardly anything, our answer is well then you don't  
3 have a business. You can't afford just to pay your  
4 suppliers, so you don't have a business.

5 Q What is your reaction when webcasters come  
6 to you and tell you that their services will help  
7 increase sales of Universal Music Group's physical  
8 product?

9 A Say show us how we can test that theory.  
10 Show us the evidence that does increase it now or show  
11 us what we can do to test the theory. If you can show  
12 that, it will definitely be taken into account with  
13 the licenses.

14 Unfortunately, the proof is not there. We  
15 have not been -- you would think if they have evidence  
16 that sales increased because of the radio play, they  
17 would show it to us. We haven't seen anything.

18 We indeed have entered into certain one-  
19 off agreements to really test the proposition with all  
20 sorts of services, not just radio. Some have proved  
21 themselves. A promotion, for instance, with  
22 Amazon.com on their front page will definitely

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1 increase sales. However, the things we have put  
2 together with other sites and services have not proved  
3 to be very beneficial. The people who put those  
4 together are the record labels themselves, not me.  
5 The record labels themselves have determined that the  
6 deals just don't show any sales improvement.

7 So therefore, as of now all I can do in  
8 the interim in these negotiations is say maybe some  
9 day there may be some promotional value. It is  
10 unproven. Exactly why should we take the risk and  
11 lower our rate as a result of that when it is totally  
12 unproven?

13 ARBITRATOR GULIN: Mr. Kenswil, did I  
14 understand you to say that you were looking for  
15 evidence as to radio play increasing sales?

16 THE WITNESS: No.

17 ARBITRATOR GULIN: When you said radio  
18 play ,what did --

19 THE WITNESS: Internet radio.

20 ARBITRATOR GULIN: Oh, okay.

21 THE WITNESS: See sales are increased by  
22 promotion that coincides with our marketing of a

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1 specific release. For instance, an oldies radio  
2 station probably doesn't change any sales whatsoever.  
3 The promotion that's value to us is promotion that  
4 coincides with our marketing plan on any given  
5 release. So if a radio station, for instance, gives  
6 away CDs and plays a lot of music and does artist --  
7 you know, promotes an artist appearance in a store or  
8 something like that, all that adds up to great  
9 promotion.

10 But simply in and of itself, playing a  
11 record on a narrow genre station that's one of  
12 thousands available to any one consumer, and maybe one  
13 of 100 available from that one company, it just  
14 dilutes the audience to such an extent and doesn't  
15 have any coordination with our promotion or marketing  
16 plan, that we see now results as a result.

17 ARBITRATOR GULIN: But as to broadcast  
18 radio in general, over-the-air broadcast radio, you  
19 feel that increases your CD sales, don't you?

20 THE WITNESS: Yes. Broadcast radio in  
21 large markets with large audiences in the right format  
22 at the right time will increase sales.

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1                    ARBITRATOR GULIN:     So if that same  
2 broadcast radio station retransmitted their signal and  
3 streamed their signal, do you have serious doubt  
4 whether that would increase your sales?

5                    THE WITNESS: I have serious doubts about  
6 it for various reasons. One, when I say in the right  
7 market at the right station, the right format, it is  
8 the ones who watch ratings. I don't see this, the  
9 business of Internet radio, as ever providing that  
10 kind of rating powerhouse on any one signal. It is  
11 really -- the way we determine our promotion of radio  
12 is we pinpoint the stations that deliver and that  
13 prove to deliver. We do not promote to every station  
14 in the world.

15                   ARBITRATOR GULIN:     But as to those  
16 stations, those stations that retransmit, and to the  
17 extent that they do increase listenership, I  
18 understand it is a question of how much they do extend  
19 the listenership, but to the extent that they do,  
20 would you expect that to that extent they would  
21 correspondingly promote sales of CDs?

22                   THE WITNESS: If everything falls into

1 place correctly, they might. But I think it's a  
2 hypothetical at this point, in the rates being set  
3 now.

4 ARBITRATOR GULIN: Thank you.

5 BY MS. WOODS:

6 Q Mr. Kenswil, before we go into discussion  
7 of the specific agreements that you have offered here  
8 into evidence today, could you tell us generally about  
9 some of the terms that are important to you to reach  
10 in a licensing agreement that are separate from the  
11 actual rate that you negotiate?

12 A Sure. The first one that comes up  
13 whenever you are talking to anyone on the Internet is  
14 data. Who controls the data and what can they do with  
15 it. Data is in many ways the medium of compensation  
16 on the Internet in these days where there is very  
17 little money flowing in any direction.

18 Data can be used two ways, from our point  
19 of view. One is that overarching all this is that we  
20 engage at UMG in permission-based marketing. We don't  
21 try to spam people with emails that they don't ask  
22 for.

1                   We have the advantage of giving them  
2 information they want. People actually sometimes are  
3 willing to pay to be marketed to. An artists' fan  
4 club is a great historical example of someone who will  
5 pay for something to be sent marketing materials.

6                   On the Internet, we find no problem having  
7 people check off the box learn more about the artist.  
8 Can we send you information? People check it off. A  
9 lot of people even check off can we send you  
10 information about other artists that are like this  
11 artist and we think you may like. People check that  
12 off. They want this communication.

13                   So our marketing efforts are actually,  
14 since they feed into things people like, permission-  
15 based marketing. In other words, if someone opts out  
16 or doesn't opt in, it's fine. We respect their  
17 wishes.

18                   So data flows both ways. One is the  
19 receiving data from the service. That data can be in  
20 the form of aggregate data or specific data.  
21 Aggregate data is usually what we want here. We have  
22 many ways of collecting email addresses, not the least

1 of which are our own forays onto the Internet. So  
2 what we really want from these companies is aggregate  
3 data. That is generally available. Companies are  
4 willing to put that in in return for a license rate in  
5 this case or non-statutory in return for a license,  
6 because it doesn't cost them anything. What they are  
7 doing is giving us research capability.

8 It is valuable because it is something  
9 they would otherwise try to sell to us, as we have  
10 seen over and over again in other areas where we don't  
11 get this contractually, they will put a price on it  
12 and try to sell it to us. So we learn who is  
13 listening, who they are listening to, not by name by  
14 the type of demographic that is listening, who they  
15 are listening to, how they correlate with listening to  
16 others, where they might live, so we can pinpoint  
17 where our record is reacting, just the basic way  
18 research radio plays well.

19 The other type of use of data is to latch  
20 onto their outbound marketing of their service. So  
21 many services send a monthly email to their users. If  
22 we can latch onto specific artists promotions on that



1 outbound marketing, and that marketing is targeted in  
2 a way that will reach the right people, that is very  
3 valuable to us because then we are sending information  
4 about an artist at a time we are promoting the artist  
5 to people most likely to care about it. So data is  
6 one of the main things we negotiate for as hard as any  
7 other point in the deal.

8 Another thing we might ask for is a ways  
9 to target promotions on the radio, on the Internet  
10 radio, on the site that the radio station is on. This  
11 can be in the form of basically free advertising. You  
12 know, getting some of the blocks that are otherwise  
13 used for ads and giving us some of that. It is  
14 essentially compensation because it's something we  
15 would otherwise have to buy.

16 Or better yet, featuring artists'  
17 promotions and wrapping programming around an artist.  
18 Again, this is most valuable for artists no one has  
19 ever heard of before. So we use things like that to  
20 promote records that you may not otherwise know are in  
21 release. It's not the catalog, which is what the  
22 majority of music on the Internet is. It's for

1 specifically artists being marketed and promoted that  
2 day. If we can get play of the artist that's fine.  
3 What we want even more of that, is a promotion around  
4 the artist because that reaches more people than  
5 simply playing the song does.

6 A step up from that would be a label-  
7 branded site. Some of our labels such as Def-Jam and  
8 Motown, and to a lesser extent some others are brands  
9 in and of themselves and have meaning, and we see an  
10 Internet radio station where that brand is extending  
11 the brand. Some of these people see that as valuable  
12 to them as well. We may actually get a channel that  
13 is branded with our label name, even though it might  
14 play music that's not just on that label. It is a  
15 branding exercise.

16 Advances are always good. In any deal,  
17 there is a give and take of advances versus backend.  
18 Most people are willing to take more upfront for less  
19 backend. If they get less upfront, they want more  
20 backend. That is a give and take in any deal that  
21 there is money involved in.

22 Finally, security, which I mentioned,

1 which is very important to us. That if these systems  
2 lead up widespread piracy, we have a way to pull back  
3 until it is fixed.

4 MS. WOODS: Mr. Kenswil, turning to the  
5 section of your testimony where you discuss Universal  
6 Music Group's Internet licensing agreements, is it  
7 correct that you -- actually, before I do that I would  
8 ask the Panel at this point, since we are going into  
9 discussion of the details of license agreements, if we  
10 could go into closed session.

11 CHAIRMAN VAN LOON: So this is the point  
12 where we have materials that are restricted?

13 MS. WOODS: Yes, that is correct.

14 CHAIRMAN VAN LOON: And we ask those who  
15 are not part of the proceeding and authorized to be  
16 here to please leave, and ask assistance to put the  
17 closed hearing sign on the outside of the door at the  
18 rear. Thank you very much.

19 (Whereupon, at 4:27 p.m. the proceedings  
20 went into Closed Session.)

21

22

CERTIFICATE

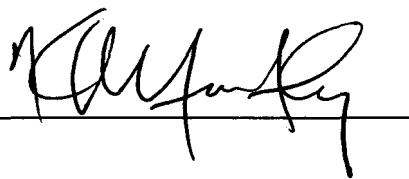
This is to certify that the foregoing transcript in  
the matter of:           Hearing: Digital Performance Right  
                                  in Sound Recording and Ephemeral  
                                  Recording,  
                                  Docket No. 2000-9 CARP DTRA 1 & 2

Before:                   Library of Congress  
                                  Copyright Arbitration Royalty Panel

Date:                     August 8, 2001

Place:                    Washington, DC

represents the full and complete proceedings of the  
aforementioned matter, as reported and reduced to  
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